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Supreme Court, U.S.
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In The

Supreme Court of the United States

IVAN GALVAN,

Petitioner,

v.

ROBERT L. AYERS, Warden, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a reviewing court endeavors to gauge the prejudicial effect of constitutional error in a criminal jury trial, to what extent can the court properly rely on a strong sense of guilt derived from the trial record in order to rule out a finding that the error substantially contributed to the jury's verdict?

LIST OF PARTIES

Petitioner, Ivan Galvan, is represented by Victor S. Haltom, Esq., of Sacramento, California.

Respondent, Robert L. Ayers, a warden in the California Department of Corrections, is represented by Deputy Attorney General Tami M. Warwick, of Sacramento, California.

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PETITION FOR A WRIT OF CERTIORARI

Ivan Galvan petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *see* App., *infra*, 1a-5a, is unreported, but is available on line at *Galvan v. Ayers*, 2008 U.S. App. Lexis 19592 (CA9 2008).

The memorandum of findings and recommendations prepared by the magistrate judge, *see* App., *infra*, 8a-83a, which was adopted in full by the district court, *see* App., *infra*, 6a-7a, is unreported.

JURISDICTION

The opinion of the court of appeals was filed on September 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compulsory Process Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have

compulsory process for obtaining witnesses in his favor. . . ."

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

In Mr. Galvan's state-court jury trial, Mr. Galvan testified that the murder with which he was charged was committed by two members of the Norteño gang. However, he was unwilling to identify those two

individuals, because he was affiliated with the gang, and he believed he and/or his family would face potentially lethal retaliation if he identified them. App. 15a, 19a-21a, 27a, 86a-87a; Tr. 520. In an effort to explain to the jury his unwillingness to identify the perpetrators, Mr. Galvan sought to present the testimony of a recognized gang expert, who would have told the jury Mr. Galvan's fear of gang retaliation was legitimate. However, the trial court prevented Mr. Galvan from presenting the gang expert's testimony. App. 18a-25a, 138a-140a.

State and federal reviewing courts, including the Ninth Circuit, have assumed the trial court's exclusion of the expert testimony improperly abridged Mr. Galvan's right to present a defense. However, those courts have concluded the error was non-prejudicial, based substantially upon those courts' assessments of the strength of the prosecution's evidence against Mr. Galvan. App. 2a-3a, 25a-26a.

The question presented in this case concerns the propriety of measuring the prejudicial effect of constitutional error by assessing the adequacy of evidence of an accused's guilt. Is it proper to gauge prejudice by focusing on the strength of the State's case, rather than assessing whether the error contributed to the jury's verdict?

Although the harmless error standards established by this Court focus on whether error substantially contributed to a jury's verdict, *Kotteakos v. United States*, 328 U.S. 750, 763-765 (1946) and

Chapman v. California, 386 U.S. 18, 23-24 (1967)[1] reviewing courts often resolve harmless error questions by looking to whether guilt has been adequately demonstrated by the trial record, without otherwise considering the nexus between error and verdict. B. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 Wis. L. Rev. 35, 59 n. 115 (2005) (collecting cases); H. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?* 70 N.Y.U. L. Rev. 1167, 1174 (1995) (observing that, in many cases, evidence of guilt has become "not just one factor playing into harmless-error analysis, but rather the sole criterion by which harmlessness is gauged").[2] Indeed, a pronounced split of authority has developed amongst state courts of last resort and circuit courts with respect to the proper focus of harmless-error analysis.

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[1] The *Kotteakos* standard is applicable in this § 2254 case. *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *see also Fry v. Pliler*, 127 S.Ct. 2321 (2007). The *Chapman* standard applies to cases on direct review. Other harmless error standards, not at issue here, apply in specific contexts. *United States v. Dominguez Benitez*, 542 U.S. 74, 86 (2004) (Scalia, J., concurring in the judgment).

[2] Guilt-focused prejudice inquiries occur frequently in cases on collateral review and cases on direct review. While the instant case comes before this Court on collateral review, both categories of cases are relevant to the harmless error issue raised in this petition. Because both the *Chapman* standard and the *Brecht/Kotteakos* standard call for an assessment of whether error contributed to a verdict, the extent to which prejudice should be determined by a reviewing court's sense of guilt is at issue in both categories of cases.

Compare People v. Carter, 36 Cal.4th 1114, 1187, 117 P.3d 476, 32 Cal.Rptr.3d 759, 817 (2005) ("error in failing to instruct that a special circumstance contains a requirement of . . . intent to kill is harmless beyond a reasonable doubt when the evidence of defendant's intent to kill was overwhelming") (internal quotation marks, brackets, and ellipsis omitted), *cert. denied sub nom. Carter v. California*, 547 U.S. 1099 (2006); *Jackson v. Brown*, 513 F.3d 1057, 1079 (CA9 2008) ("The evidence supporting Jackson's guilt of the offenses of conviction is overwhelming. So he cannot demonstrate that the alleged errors had a 'substantial and injurious effect or influence in determining the jury's verdict.'") (*quoting Brecht*, 507 U.S. at 637); *with State v. Alvarez-Lopez*, 136 N.M. 309, 319-320, 98 P.3d 699, 709-710 (2004) ("[C]onstitutional error cannot be deemed harmless simply because there is overwhelming evidence of the defendant's guilt. Our focus must remain squarely on assessing the likely impact of error on the jury's verdict."), *cert. denied sub nom. New Mexico v. Alvarez-Lopez*, 543 U.S. 1177 (2005); *Ferensic v. Birkett*, 501 F.3d 469, 483 (CA6 2007) ("*Kotteakos* prohibits us from simply focusing on the sufficiency of the evidence"); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1100 (CA6 1990) (en banc) (although evidence of guilt was "strong," court could not rule out finding that error contributed to verdict), *cert. denied*, 499 U.S. 970 (1991).

Conducting a harmless error inquiry focused on strength of the evidence against the accused, rather

than assessing whether a constitutional error contributed to a jury's verdict, can be outcome determinative. G. Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 Cal. L. Rev. 1335, 1347-1352 (1994) (survey demonstrating that reversal is dramatically more likely when the prejudice inquiry is focused on the contribution of error to a verdict rather than the strength of the showing of guilt); *accord*, 2 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 31.4d at 1539 (5th ed. 2005) ("In the usual case, . . . the two approaches require *different* analyses, which are quite capable of reaching different results.") (italics in the original); H. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?* 70 N.Y.U. L. Rev. 1167, 1186-1187 n. 81 (1995).

Review on certiorari is warranted pursuant to this Court's Rule 10 in order to resolve the conflict amongst the courts as to the proper mode of analyzing the prejudicial effect of constitutional error. Indeed, because harmless error principles "may determine the outcome of more criminal appeals than any other doctrine[,]" J. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 Nw. U. L. Rev. 1053, 1054-1055 & n. 5 (2005) (collecting authority), the proper role of evidence of guilt in harmless error inquiry ought not to be left unsettled.

A. Basis for Jurisdiction in the Lower Courts

This is a habeas case brought in federal court by a state prisoner. The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The court of appeals had jurisdiction of the appeal pursuant to 28 U.S.C. § 2253(a).

B. Procedural Background

Mr. Galvan was convicted by jury in the Sacramento County Superior Court of murder. The jury found the murder was committed during the course of a robbery, and that Mr. Galvan and co-defendant Acuna personally used firearms in the commission of the offense. App. 9a, 84a.

On September 27, 1996, the trial court sentenced Mr. Galvan to imprisonment for life without the possibility of parole. App. 9a-10a, 84a.

On direct review, the California Court of Appeal affirmed Mr. Galvan's conviction and sentence. App. 84a-97a.

The California Supreme Court summarily denied Mr. Galvan's petition for discretionary review. App. 98a.

Mr. Galvan litigated two full rounds of habeas challenges in state court. All of the collateral challenges he raised in state court were denied. App. 99a-137a.

On May 24, 2000, Mr. Galvan filed a 28 U.S.C. § 2254 petition in district court. App. 12a.

After protracted litigation, including an evidentiary hearing, App. 13a, the assigned magistrate judge recommended denial of Mr. Galvan's § 2254 petition. App. 8a-83a. On September 25, 2006, the district court adopted the findings and recommendations and denied the petition. App. 6a-7a.

On September 9, 2008, the Ninth Circuit affirmed the district court's denial of Mr. Galvan's habeas petition. App. 1a-5a.

C. Factual Background

1. The State's Evidence

On February 17, 1995, Bora Vong Phan Vong Sa was shot to death at a market near the "D" Gas Station in southern Sacramento County. Mr. Phan Vong Sa had been working at the market as a clerk. App. 13a-14a, 85a.

At the approximate time of the shooting, brothers Christopher and Allen Annis[3] drove up to the "D" Gas Station. They saw Hispanic males run out of the market, get into a Ford Thunderbird, and speed off. App. 14a, 85a.

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[3] For the sake of clarity, the brothers are referred to hereafter by their first names.

Police responded and interviewed the Annis brothers. Allen told police he had seen two Hispanic males come out of the store. He did not see a gun, but he noticed one of the Hispanic males was carrying something. That individual had entered the passenger side of the Thunderbird. Allen described the two individuals he saw as approximately 5'9" and 180 pounds. He said they were both wearing "black windbreaker type jackets." ER[4] 89-90, 251.[5] Christopher told police that there were a total of four suspects, all Hispanic males in their late teens or early twenties, one of whom was carrying a gun. App. 14a, 85a; ER 89-90, 260.

Allen had seen the Thunderbird's license plate number, and based on that information police determined the suspect vehicle was registered to Carmen Trillo. Ms. Trillo is the mother-in-law of Mr. Galvan's co-defendant, Gonzalo Acuna. The police set up surveillance at Ms. Trillo's residence. Messrs. Galvan and Acuna arrived at Ms. Trillo's residence in the Thunderbird at approximately 45 minutes after the homicide. Mr. Acuna was driving. App. 14a, 85a-86a.[6]

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[4] "ER" refers to the excerpts of record filed in the Ninth Circuit.

[5] At the time of his arrest, Mr. Galvan was wearing a purple hooded shirt. He was 5'6" and weighed 115 pounds. ER 249, 256.

[6] A detective drove from the "D" Gas Station to Ms. Trillo's residence. The driving time was approximately 30 minutes. Tr. 309.

During the arrest of Messrs. Galvan and Acuna, police found two guns, a Cobray and a Lorcin. The Cobray was found on the ground next to the driver's door of the Thunderbird. The Lorcin was found under the car on the passenger side. Ballistics testing revealed that a bullet recovered from the victim's body and a spent casing found at the crime scene came from the Cobray. Another casing found at the scene may have come from the Lorcin. App. 14a, 86a.

On the day following the homicides, a detective presented a photographic lineup to Allen. The photo lineup contained a photograph of Mr. Galvan. However, Allen skipped over Mr. Galvan's photo and identified the photo of another individual as one of the Hispanic males he had seen running out of the market. Tr. 321-327; ER 89, 216.[7]

During the trial, Christopher positively identified Mr. Galvan as one of the people he had seen running out of the market. Allen testified that he thought Mr. Galvan looked familiar. App. 15a, 86a. Christopher testified that he had seen three people run out of the store and get into the Thunderbird. Tr. 394-396. Allen

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[7] In its opinion on direct review of Mr. Galvan's conviction, the California Court of Appeal erroneously stated: "Allen and Christopher Annis identified [Mr. Galvan] from a photo lineup." App. 86a. Although Allen did testify at trial that he had picked Mr. Galvan our of a photo lineup, Tr. 171, the detective who conducted the photo lineup testified, as noted above, that Allen picked a filler out of the lineup rather than Mr. Galvan. Tr. 321-327; ER 89, 216.

testified that he had seen two people come from the store and get into the Thunderbird, and that a third person was seated in the rear seat of the vehicle. Tr. 164-166. Allen stated that he "never actually looked at" these people. Tr. 164. Whereas Christopher testified that Mr. Galvan got into the driver's side of the vehicle, Tr. 425; ER 90, Allen testified that the person he thought was Mr. Galvan entered the passenger side of the vehicle. Tr. 202; ER 89.

Anthony Esquivel is a close, long-time friend of Mr. Galvan's. Tr. 358-359. On the morning of the incident, Mr. Galvan showed Mr. Esquivel the aforementioned Lorcin. Mr. Galvan was carrying it in his backpack. Also on the morning of the incident, Mr. Esquivel saw Messrs. Galvan and Acuna in Ms. Trillo's vehicle. Mr. Esquivel testified that Messrs. Galvan and Acuna are members of the Norteño gang. App. 14a, 21a, 86a; Tr. 380.

2. Mr. Galvan's Testimony

Mr. Galvan testified that, on the date in question, although he was at the scene at the time of the shooting, he was not involved in the shooting or any planning in connection with the shooting. Three other individuals were present with Mr. Galvan at the scene. All three of those individuals have connections with the Norteño gang. One of those three other individuals was Mr. Galvan's co-defendant, Mr. Acuna. Messrs. Galvan and Acuna were in a vehicle in the parking lot at the "D" Gas Station, when the two

individuals had gone inside, and unbeknownst to Galvan and Acuna, perpetrated the homicide. App. 15a, 40a, 86a-87a.

In the hours before the incident, Mr. Galvan had been with Mr. Acuna in a park. They were drinking beer. At the park, they met up with the aforementioned two individuals. The four of them then drove to a remote location where they all took turns shooting two guns into the Sacramento River. One of the guns, the Lorcin, was Mr. Galvan's. The other gun, the Cobray, was Mr. Acuna's. After shooting the guns, they drove around for a while and eventually stopped at the "D" Gas Station in order to purchase more beer. The guns had been placed under the front seat of the vehicle. As noted above, Messrs. Galvan and Acuna remained in their vehicle in the parking lot, while the other two went in. Mr. Galvan did not notice that the two individuals had taken the guns with them. App. 15a, 87a; ER 147-148.

When the two individuals returned to the car, they acted strangely. Mr. Galvan noticed one of them putting something under the front seat. The two individuals stated that the store clerk would not sell beer to them. Messrs. Galvan and Acuna drove the two individuals back to the park where they had met earlier in the day. They dropped them off. Then, Messrs. Galvan and Acuna drove to Ms. Trillo's residence, where they saw police officers. Mr. Galvan dropped his gun, which he had just retrieved. App. 15a-16a, 87a; ER 148-149.

On cross-examination, the prosecutor asked Mr. Galvan to name the two individuals. Mr. Galvan refused, explaining that he and/or his family would face lethal gang retaliation if he did so.[8] Thereupon, in the presence of the jury, the trial court stated it would order Mr. Galvan's testimony stricken if he did not name the two men. Although Mr. Galvan persisted in his refusal to divulge their names, the court decided against striking Mr. Galvan's testimony. App. 19a-21a, 27a; Tr. 520.[9]

3. The Exclusion of the Gang Expert's Testimony

Lee Smith is a semi-retired law enforcement officer. He worked for twelve years in the Sacramento County Sheriff's Department gang suppression unit. He is recognized by the Department of Justice as an expert regarding Hispanic gangs in California. He has been recognized as a gang expert in court many

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[8] Mr. Galvan grew up in an area in Sacramento County, which has a significant population of Norteño gang members and associates. Mr. Galvan has had numerous friends and acquaintances who are involved with or associated with the Norteño gang. Mr. Galvan's mother and father, and his three siblings, reside in the Sacramento area. App. 138a-140a; ER 79, 121, 311, 731.

[9] Mr. Galvan's friend, Mr. Esquivel, who was called to testify by the prosecution, also told the jury a Norteño "could be killed" if he implicated a fellow gang member in a crime. However, following this testimony, the trial court interjected: "I think we are in the area of speculation." App. 28a.

times, and has testified as a prosecution witness in that capacity. App. 138a-139a.

Had Mr. Smith testified in this case, he would have informed the jury that he was familiar with Mr. Galvan's affiliation with the Norteño gang, App. 140a, and he would have explained the following to the jury:

> If a Norteño were ever to 'snitch' on a fellow gang member, he would be in grave danger, and his family would be in grave danger. Indeed, a Norteño who gives information to law enforcement about a fellow gang member could quite possibly be killed by other Norteños. Similarly[,] members of the family of such a person could quite possibly be killed. The Norteño gang obviously has many members in the California prison system. A Norteño who became a 'snitch' in prison would be in danger of being killed in the prison.

App. 139a.

The trial court refused to allow Mr. Galvan to present Mr. Smith's testimony to the jury. App. 18a-25a. At every stage of the post-conviction process, Mr. Galvan has asserted that the exclusion of Mr. Smith's testimony was a prejudicial violation of his right under the Sixth and Fourteenth Amendments of the United States Constitution to present a complete and meaningful defense. App. 2a-3a, 8a, 10a, 25a-26a.

REASONS FOR GRANTING THE PETITION

Professor LaFave has observed that, in the years following *Chapman v. California*, 386 U.S. 18, this Court "has appeared to move back and forth between relying heavily upon the presence of proof of guilt in its harmless error analysis, and considering that proof as less central to the inquiry." 7 W. LaFave, et al., *Criminal Procedure* § 27.6(e) at 134 (3d ed. 2007).[10] Similarly, the Supreme Court of New Mexico has remarked that this Court, "[a]t times, . . . may have used language in its opinions suggesting that

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[10] *See id.* at 134-136 (citing *Harrington v. California*, 395 U.S. 250, 254 (1969) ("overwhelming evidence of guilt"); *United States v. Hasting*, 461 U.S. 499, 512 (1983) ("overwhelming evidence of guilt"); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (remanding for lower court to determine whether error "might have affected the reliability of the factfinding process at trial"); *Satterwhite v. Texas*, 486 U.S. 249, 258-260 (1988) (unable to say error did not contribute to verdict); *Arizona v. Fulminante*, 499 U.S. 279, 295-302 (1991) (unable to say error did not contribute to verdict); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.") (italics in the original); *Neder v. United States*, 527 U.S. 1, 16-17 (1999) (overwhelming evidence of guilt); *Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003) (stating that question is whether error contributed to verdict); *see also Rose v. Clark*, 478 U.S. 570, 579 (1986) (asserting that error should be deemed harmless where "a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt"); *Yates v. Evatt*, 500 U.S. 391, 402-403 n. 8 (1991) (disapproving the quoted language from *Rose*).

constitutional error was harmless whenever properly admitted evidence at trial provided overwhelming support for a determination of guilt." *State v. Alvarez-Lopez*, 98 P.3d at 708 (citing *United States v. Hasting*, 461 U.S. at 510-512); *accord*, R. Fairfax, *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 Fordham L. Rev. 2027, 2037 (2008) ("the Court has shifted between the two standards – harmlessness based upon whether the error contributed to the verdict and harmlessness based upon whether the residual evidence was overwhelming – in applying the harmless error rule to federal constitutional error").

In light of this apparent vacillation, it is not surprising that the lower courts have not proceeded with uniformity in their selection of criteria by which to assess whether constitutional error is harmless. Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 Cal. L. Rev. at 1346-1347 & nn. 76-79 ("Lower court decisions evince this state of confusion: both federal and state courts continue to apply the contribution-to-the-conviction, overwhelming-evidence, and hybrid variants of the harmless error test.") (footnotes omitted) (collecting cases).

In the instant federal habeas case, the principal focus of the Ninth Circuit's prejudice inquiry was on the court's sense of the strength of the evidence against Mr. Galvan. App. 2a-3a. The court maintained this focus despite the governing *Brecht/Kotteakos* standard, which prescribes a focus on

whether error substantially contributed to the verdict in question.[11] And aside from the guilt-focused component of the court's prejudice inquiry, the court gave no legitimate consideration to factors that may have contributed to the jury verdict against Mr. Galvan. Thus, the Ninth Circuit's prejudice inquiry does not satisfy the demands of the Constitution.[12]

In Harmless Error Review, the Strength of the Evidence Against the Accused Is Appropriately Considered, But the Ultimate Inquiry Is Whether the Error Substantially Contributed to the Verdict.

The state and federal courts that have reviewed this case have assumed, without deciding, that Mr. Galvan was erroneously prevented from presenting the expert testimony of Lee Smith. App. 2a, 25a-26a, 93a. However, those courts have concluded the error was harmless based upon (1) the purportedly

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[11] "[T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not one's." *Kotteakos*, 328 U.S. at 764.

[12] "Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman*, 386 U.S. at 21.

cumulative nature of the proffered testimony, and (2) the purported strength of the State's case against Mr. Galvan. App. 2a-3a, 27a-30a, 93a, 104a. The most recent reviewing court, the Ninth Circuit, explained its conclusion in this regard as follows:

> [T]he state court's determination that Petitioner was not prejudiced by the trial court's refusal to allow expert testimony on gang culture was not objectively unreasonable. [Citation.] At trial, Petitioner testified that other fellow gang members perpetrated the robbery and murder in question but that he could not identify them for fear of gang retaliation. Petitioner's proposed expert would have testified that such a fear would be reasonable given the gang culture of retaliation against informers. The state court concluded that any error in not allowing this testimony was harmless because (1) the proposed testimony would have been cumulative, and (2) other evidence linking Petitioner to the crime was strong.

App. 2a.

Preliminarily, the Ninth Circuit's characterization of the proffered testimony of the gang expert as cumulative is factually baseless and inconsistent with this Court's precedent. The gang expert would have testified that Mr. Galvan's unwillingness to identify the perpetrators was based upon legitimate concerns for the safety of himself and his family. App. 138a-140a. This evidence is not cumulative of Mr. Galvan's self-interested testimony regarding the reasons for

his unwillingness to identify the perpetrators of the murder with which he was charged. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (rejecting the characterization of proffered testimony from "disinterested witnesses" as cumulative, even though it merely would have corroborated the accused's testimony).[13]

Thus, the only legitimate criterion upon which the Ninth Circuit relied in its prejudice inquiry was the strength of the case against Mr. Galvan.[14]

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[13] Under the controlling law of the jurisdiction in which Mr. Galvan was tried, gang expert testimony is relevant to explain the unwillingness of a witness to identify a gang-related suspect. *People v. Cuevas*, 12 Cal.4th 252, 276, 906 P.2d 1290, 1305, 48 Cal.Rptr.2d 135, 150 (1995).

[14] The Ninth Circuit's assessment that the evidence was strong was based upon eyewitness testimony and evidence that one of the murder weapons was found near the vehicle in which Mr. Galvan was arrested less than one hour after the homicide. App. 3a. Contrary to the Ninth Circuit's assessment, the evidence was not particularly strong. First, although two brothers witnessed the perpetrators fleeing from the crime scene, and one of the brothers identified Mr. Galvan as a fleeing perpetrator, App. 3a, the other brother, when shown a photographic line-up containing a photograph of Mr. Galvan, skipped over Mr. Galvan's photograph and identified someone else. Tr. 321-327. Not only does the foregoing constitute less than solid eyewitness identification evidence, but also this Court has long recognized the "inherent unreliability" of eyewitness identification evidence, *Watkins v. Sowders*, 449 U.S. 341, 352 (1981), and "eyewitness misidentification is the single most important factor leading to wrongful convictions in the United States." *Ferensic v. Birkett*, 501 F.3d at 482-483 (internal quotation marks omitted). Second, the fact that one of the murder weapons was found with Mr. Galvan shortly after the homicide was neither disputed nor particularly significant. It was his gun. As he testified, the

(Continued on following page)

However, the strength of the State's case *alone* cannot justify a finding of harmlessness,[15] particularly in a case such as the instant case, where the constitutional error involves the exclusion of critical defense evidence. *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.").

As outlined above, a uniform approach has not been taken by the courts of this country in conducting harmless error analysis. Although this Court's leading decisions in *Kotteakos*, *Chapman*, and *Brecht* prescribe prejudice inquiries focused on whether error contributed to a jury's verdict, and although the strength of evidence of guilt is a relevant consideration in this calculus, evidence of guilt has become, in many cases, "not just one factor playing into harmless-error analysis, but rather the sole criterion by

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perpetrators had access to his gun, and they had left it in the vehicle in which Mr. Galvan was arrested, after the perpetrators had, unbeknownst to Mr. Galvan, used the gun during the homicide. App. 15a, 40a, 86a-87a; ER 148-149.

[15] *Kotteakos*, 328 U.S. at 776 ("[t]hat conviction would, or might probably, have resulted in a properly conducted trial is not the criterion"); *Brecht*, 507 U.S. at 642 (Stevens, J., concurring) ("The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place. *Kotteakos* is full of warnings to avoid that result."); *State v. Alvarez-Lopez*, 98 P.3d at 709 ("constitutional error cannot be deemed harmless simply because there is overwhelming evidence of the defendant's guilt").

which harmlessness is gauged." Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?* 70 N.Y.U. L. Rev. at 1174. This case presents an opportunity for this Court to address this important and unsettled area of law by demarcating the role of evidence of guilt in harmless error analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VICTOR S. HALTOM
Attorney for Petitioner
Ivan Galvan

December 5, 2008

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IVAN GALVAN, Petitioner-Appellant, v. ROBERT AYERS, et.al., Respondent-Appellee.	No. 07-16271 D.C. No. CV-00-1142-RRB/DAD MEMORANDUM* (Filed Sept. 09, 2008)

Appeal from the United States District Court
for the Eastern District of California
Ralph R. Beistline, District Judge, Presiding

Argued and Submitted August 11, 2008
San Francisco, California

Before: THOMPSON and WARDLAW, Circuit Judges, and MOSKOWITZ, District Judge.**

Ivan Galvan ("Petitioner") appeals from the district court's denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254. We affirm the district court's denial of habeas corpus relief for the reasons set forth below.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

Petitioner argues that he was deprived of the right to present a defense because the trial court failed to grant a continuance and allow the testimony of a gang expert. Petitioner also requests habeas relief on the ground that he received ineffective assistance of counsel at trial. Finally, Petitioner argues that the district court should have granted an evidentiary hearing on his claim that the trial judge was biased against him.

First, the state court's determination that Petitioner was not prejudiced by the trial court's refusal to allow expert testimony on gang culture was not objectively unreasonable. *See Williams v. Taylor,* 529 U.S. 362, 409 (2000) (explaining the standard for determining "unreasonable application . . . of clearly established federal law" under AEDPA (internal quotation marks omitted)). At trial, Petitioner testified that other fellow gang members perpetrated the robbery and murder in question but that he could not identify them for fear of gang retaliation. Petitioner's proposed expert would have testified that such a fear would be reasonable given the gang culture of retaliation against informers. The state court concluded that any error in not allowing this testimony was harmless because (1) the proposed testimony would have been cumulative, and (2) other evidence linking Petitioner to the crime was strong.

The district court concluded that the lack of gang expert testimony did not have a "substantial and injurious effect" on the verdict given the obvious and cumulative nature of the expert testimony. *See Brecht*

v. Abrahamson, 507 U.S. 619, 637 (1993) (explaining the harmless error standard). At trial, Petitioner and Esquivel, who is affiliated with the Norteno gang, testified regarding the possibility of gang retaliation. The state court's determination regarding harmless error is also supported by the strength of the other evidence against Petitioner such as (1) Christopher Annis's eyewitness identification of Petitioner as one of the perpetrators; (2) undisputed evidence that Petitioner showed one of the murder weapons to a friend on the morning of the incident; and (3) undisputed evidence that the two weapons were discovered under and next to the car in which Petitioner was riding at the time of the arrest, less than one hour after the murder.

Second, Petitioner is not entitled to habeas relief on the ground that he received ineffective assistance of counsel from his trial counsel, Mr. Holmes. Petitioner is not exempt from establishing prejudice. *See United States v. Cronic,* 466 U.S. 648, 658-59 (1984) (prejudice does not need to be established where the attorney's failure is so complete that there is no meaningful adversarial testing of the prosecution's case). Contrary to Petitioner's argument, Mr. Holmes was not constructively absent from the case. Mr. Holmes met with Petitioner to discuss his case, hired an investigator to conduct an investigation, conducted adequate direct and cross examination of witnesses, presented a defense, and adequately argued the defense at closing argument. During the time period when Mr. Holmes did not meet with Petitioner

himself, Mr. Holmes's case investigator met with the Petitioner to discuss his case. Through these actions, Petitioner's counsel subjected the prosecution's case to meaningful adversarial testing.

Nor did Petitioner suffer prejudice from the failure of his trial attorney to (1) ensure the presence of the gang expert at trial, and (2) investigate witnesses who would have corroborated the fact that there were four men at the scene of the crime rather than three. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) (defining prejudice as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). For the reasons set forth above, the absence of testimony on gang culture did not have a substantial impact on the verdict. Corroboration of Petitioner's testimony that there were four men at the scene of the crime would not have undermined Christopher Annis's eyewitness identification of Petitioner as one of the men running out of the market or the undisputed evidence linking Petitioner to the murder weapon. The state court's determination that Petitioner was not prejudiced by these alleged failures was objectively reasonable because the desired testimony would not have significantly affected the substantial evidence linking Petitioner to the murder.

Finally, the district court did not err in refusing to grant an evidentiary hearing on Petitioner's judicial bias claims. Petitioner's allegations that the judge appeared angry and exasperated and displayed

body language expressing discomfort or disbelief of testimony favorable to Petitioner is insufficient to establish judicial bias. *See Liteky v. United States*, 510 U.S. 540, 555-56 (1994).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

IVAN GALVAN,
Petitioner,

vs.

ROBERT L. AYERS,
Respondent. /

No. CIV
S-00-1142 DFL DAD P

ORDER

(Filed Sept. 25, 2006)

Petitioner, a state prisoner proceeding through counsel, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On March 15, 2006, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed March 15, 2006, are adopted in full; and

2. Petitioner's application for a writ of habeas corpus is denied.

DATED: 9/25/2006

/s/ David F. Levi
DAVID F. LEVI
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

IVAN GALVAN,
Petitioner,
vs.
ROBERT L. AYERS,
Respondent. /

No. CIV S-00-1142 DFL DAD P

FINDINGS & RECOMMENDATIONS

(Filed Mar. 15, 2006)

Petitioner is a state prisoner proceeding through counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1996 conviction on charges of special circumstance first degree murder with personal use of a firearm and robbery with personal use of a firearm. He seeks relief on the grounds that: (1) his trial counsel effectively abandoned him, resulting in a constructive denial of his Sixth Amendment right to counsel; (2) trial counsel has a pattern and practice of providing his clients in criminal cases with constitutionally inadequate representation and provided petitioner with prejudicially ineffective assistance of counsel; (3) petitioner's due process right to a fundamentally fair trial was compromised when the trial court refused to grant a continuance so defense counsel could present expert testimony by Lee Smith, a former officer in the Sacramento County Sheriff's Department gang suppression unit, concerning gang-related matters that were central to the defense theory of the case; (4) the trial court erroneously

failed to instruct the jury on the concept of reasonable foreseeability and erroneously denied petitioner's request for jury instructions on third party culpability and voluntary intoxication; (5) the trial judge was not impartial; and (6) cumulative error requires that habeas relief be granted and that his conviction be vacated. Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner's application for habeas corpus relief be denied.

PROCEDURAL BACKGROUND

On June 8, 1995, an information was filed in the Sacramento Superior and Municipal Court charging petitioner and co-defendant Gonzalo Acuna with murder, in violation of Cal. Penal Code § 187(a) (count 1) and robbery, in violation of Cal. Penal Code § 211 (count 2). (Clerk's Transcript on Appeal (CT) at 8-10.) It was alleged, as to both counts, that petitioner and co-defendant Acuna personally used a firearm in the commission of the offenses. (*Id.*) It was also alleged, as a special circumstance, that the murder was committed during the commission of the robbery. (*Id.* at 9.)

Jury trial commenced on July 22, 1996. (*Id.* at 171.) On July 30, 1996, the jury found petitioner and co-defendant Acuna guilty on both counts and found the firearm and special circumstance allegations to be true. (*Id.* at 180, 183-84.) On September 27, 1996, petitioner was sentenced to life in prison without the

possibility of parole for the murder plus ten years for the firearm enhancement. (*Id.* at 189.) The sentence on the robbery conviction was stayed pursuant to Cal. Penal Code § 654. (*Id.*)

Petitioner filed a timely appeal, claiming that: (1) his rights to present a defense, to due process and to the effective assistance of counsel were violated when the trial court denied his request to reopen his case to present the testimony of a gang expert; (2) the trial court erroneously denied his request for a pinpoint instruction on third party culpability; and (3) the trial court erroneously refused to give a requested jury instruction on voluntary intoxication. (Am. Answer, Ex. C.) The California Court of Appeal for the Third Appellate District affirmed petitioner's conviction in its entirety in an unpublished order filed February 24, 1998. (*Id.*) In an order filed May 13, 1998, the California Supreme Court summarily denied review. (Am. Answer, Ex. E.)

On or about May 13, 1999, petitioner filed a petition for writ of habeas corpus in the Sacramento County Superior Court. (Am. Answer, Ex. F.) Therein, he set forth a factual basis for each of his federal claims except the pattern-and-practice claim of ineffective assistance of counsel alleged as ground two in the amended federal habeas petition. (*Id.*) That petition was denied by the Superior Court in a reasoned opinion dated June 9, 1999, which concluded that most of petitioner's claims were procedurally barred and that petitioner had failed to make a prima

facie showing as to any of his claims. (Am. Answer, Ex. G.) On September 8, 1999, petitioner filed a petition for writ of habeas corpus in the California Court of Appeal for the Third Appellate District. (Am. Answer, Ex. H.) Therein, he raised the same claims and added a claim that petitioner's trial and appellate counsel were ineffective in failing to challenge the trial court's failure to give a jury instruction on the concept of reasonable foreseeability. (*Id.*) That petition was summarily denied by order dated September 23, 1999. (Am. Answer, Ex. I.)

On September 28, 1999, petitioner filed a petition for writ of habeas corpus in the California Supreme Court, raising the same claims raised in his habeas petition to the California Court of Appeal. (Am. Answer, Ex. J.) On December 20, 1999, petitioner filed a supplemental petition in the California Supreme Court, offering additional evidence in support of his claim of ineffective assistance of counsel and claiming, for the first time, the constructive denial of the right to counsel. (Am. Answer, Ex. K.) On March 29, 2000, the court denied that petition with citation to *In re Waltreus*, 62 Cal. 2d 218, 225 (1965); *In re Dixon*, 41 Cal. 2d 756, 759 (1953); *In re Swain*, 34 Cal. 2d 300, 304 (1949); and *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). (Am. Answer, Ex. L.)

Petitioner filed his federal habeas petition on May 24, 2000.[1] On September 13, 2000, respondent filed a motion to dismiss the petition as barred by the applicable statute of limitations and as procedurally defaulted. By order dated August 30, 2001, respondent's motion to dismiss was denied. Respondent filed an answer on December 19, 2001.

On February 25, 2002, petitioner applied for a stay of the federal proceedings pending exhaustion of an unexhausted claim based on newly discovered evidence. Petitioner commenced a second round of state habeas proceedings by filing a habeas petition in the Sacramento Superior Court on the same date he applied for a stay of the federal proceedings. (Pet'r's Application for Order Staying Federal Habeas Proceedings, Ex. A at 2-4, lodged February 25, 2002.) That new state petition presented the pattern-and-practice claim of ineffective assistance of counsel later alleged as ground two in the amended federal habeas petition. (*Id.*) The Superior Court denied the petition in a reasoned decision on March 14, 2002. (Am. Pet. at 5-6.) A habeas petition filed in the California Court of Appeal was denied on April 11, 2002. (*Id.* at 6.) The California Supreme Court summarily denied review on July 10, 2002. (*Id.*; Pet'r's Status Report filed July 11, 2002, & Ex. A.) On July 31, 2002, petitioner filed his amended federal habeas petition, upon which this

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[1] *See Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 635 n.1 (N.D. Cal. 1978) (judicial notice may be taken of court records), *aff'd*, 645 F.2d 699 (9th Cir. 1981).

action is proceeding. On November 15, 2002, respondent filed an amended answer and on December 20, 2002, petitioner filed a traverse.

By order dated September 14, 2004, petitioner's request for an evidentiary hearing was granted. On October 27, 2004, an evidentiary hearing was held on petitioner's claim that his trial counsel effectively abandoned petitioner and constructively denied him his Sixth Amendment right to counsel, as alleged in ground one of the amended petition, and on petitioner's allegations that defense counsel provided prejudicially ineffective assistance in the specific ways alleged in ground two of the amended petition.[2] On December 8, 2004, petitioner filed a post-evidentiary hearing brief and on December 16, 2004, respondent filed an evidentiary hearing summation brief.

FACTUAL BACKGROUND[3]

> At about 3:45 p.m. on February 17, 1995, defendant and two other Hispanic men robbed the Courtland Market and shot and killed the clerk, Bora Vong Phan Vong Sa.

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[2] The court did not hear testimony on petitioner's claim that defense counsel has a pattern and practice of providing constitutionally inadequate representation.

[3] The following summary is drawn from the February 25, 1998 opinion by the California Court of Appeal, Third Appellate District (hereinafter Opinion), at pgs. 2-4, filed on November 15, 2002, as Exhibit C to respondent's amended answer.

Defendant and his accomplices ran out of the market, got into a Ford Thunderbird and sped off. Christopher Annis, who had just driven up to the D Gas Station next door to the market, witnessed the men running out of the market with guns. He yelled out "guns" and the license number of the Thunderbird. Christopher's brother, Allen Annis, wrote the number down. Allen also saw three Hispanic men. The Thunderbird was registered to Gonzalo Acuna's mother-in-law, Carmen Trillo. The police set up surveillance of Trillo's residence in Sacramento. Shortly thereafter, at about 4:30 p.m., defendant and Acuna arrived in the Thunderbird. Acuna was driving. Two semi-automatic weapons, a Cobray and a Lorcin, were recovered. The Cobray was found next to the driver's door on the ground. The Lorcin was found under the car on the passenger side. Defendant and Acuna each had about $50.

Phan Vong Sa died from a gunshot wound to the back of the head. He also suffered a gunshot wound that went through his chest and arm. A bullet removed from Phan Vong Sa and a spent cartridge case found at the market came from the Cobray. A spent projectile found at the market was consistent with having been fired by the Lorcin.

Anthony Esquivel saw Acuna and defendant in Trillo's car the morning of the robbery and murder. Defendant showed him the Lorcin. Esquivel testified that defendant and Acuna were members of the Nortenos gang.

At trial, Christopher Annis positively identified defendant as one of the men who ran out of the market. Allen Annis thought defendant looked familiar. Allen and Christopher Annis identified defendant from a photo lineup.

Defendant testified. One or two nights before the robbery/murder, defendant purchased the Lorcin using $80 from his paycheck. The next morning, defendant showed the gun to Esquivel. Defendant and Esquivel met Acuna at a park. Acuna was driving the Thunderbird. They drove to Elmo's liquor store where defendant bought at [sic] 12-pack of beer. They went to Temple Park where they met two Hispanic men with whom they shared their beer. The two men were wearing dark clothing. One had on a black windbreaker and a black wool knit cap. Although defendant knew the names of the two men, he refused to reveal them because he feared retribution from their gang. Upon finishing the beer, defendant bought another 12-pack at Elmo's. Defendant, Acuna and the two men went to the river where they all took turns shooting defendant's and Acuna's guns. The guns were then placed under the front seat. When they stopped for more beer, Acuna and defendant stayed in the car while the two men went into the Courtland Market. Defendant did not notice if they took the guns. He heard no gunshots but the radio was very loud. The two men returned to the car and acted crazy. One of the men put something under the front seat. They had not bought any beer.

Acuna drove back to Elmo's where they dropped off the two men. Defendant did not "feel like going to work" because he felt "a little buzzed." Acuna and defendant then drove to Trillo's house where they were arrested.

Defendant did not know if the two Hispanic men "killed the guy or not."

ANALYSIS

I. Standards of Review Applicable to Habeas Corpus Claims

A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state courts. *See Peltier v. Wright,* 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v. Cupp,* 768 F.2d 1083, 1085 (9th Cir. 1985) (citing *Engle v. Isaac,* 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the interpretation or application of state law. *See Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991); *Park v. California,* 202 F.3d 1146, 1149 (9th Cir. 2000); *Middleton,* 768 F.2d at 1085.

However, a "claim of error based upon a right not specifically guaranteed by the Constitution may nonetheless form a ground for federal habeas corpus relief where its impact so infects the entire trial that the resulting conviction violates the defendant's right to due process." *Hines v. Enomoto,* 658 F.2d 667, 673 (9th Cir. 1981) (citing *Quigg v. Crist,* 616 F.2d 1107 (9th Cir. 1980)). *See also Lisenba v. California,* 314

U.S. 219, 236 (1941); *Henry v. Kernan,* 197 F.3d 1021, 1031 (9th Cir. 1999). In order to raise such a claim in a federal habeas corpus petition, the "error alleged must have resulted in a complete miscarriage of justice." *Hill v. United States,* 368 U.S. 424, 428 (1962). *See also Henry,* 197 F.3d at 1031; *Crisafi v. Oliver,* 396 F.2d 293, 294-95 (9th Cir. 1968). Habeas corpus cannot be utilized to try state issues *de novo. Milton v. Wainwright,* 407 U.S. 371, 377 (1972).

Because this action was filed after April 26, 1996, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") are applicable. *See Lindh v. Murphy,* 521 U.S. 320, 336 (1997); *Clark v. Murphy,* 331 F.3d 1062, 1067 (9th Cir. 2003). Section 2254(d) as amended by the AEDPA, sets forth the following standards for granting habeas corpus relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). *See also Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Williams v. Taylor*, 529 U.S. 362 (2000); *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001).

II. Procedural Default

Respondent renews his arguments, previously rejected by this court, that all of the claims presented by petitioner in his amended petition are barred due to procedural default. (Am. Answer at 16-25.) For the reasons set forth in this court's order dated August 30, 2001, the court concludes that petitioner's claims are not procedurally barred.

III. Petitioner's Claims[4]

A. Continuance/Admission of Evidence

Petitioner claims that his right to present a defense and to a fair trial were violated when the trial court refused to allow him to present the expert testimony of Deputy Sheriff Lee Smith (Smith) to

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[4] For purposes of clarity, the court will not analyze petitioner's claims in the order in which they were presented in the amended petition.

support his defense theory.[5] As described above, petitioner declined to reveal at trial the names of the other two persons who were with him and his co-defendant at the scene of the crime. Petitioner explains that had Smith testified, he would have explained to the jury that petitioner could not disclose the identities of the two alleged actual perpetrators of the homicide because if he did so, he and his family would be in "grave" danger of retaliation from the perpetrators' fellow gang members. Petitioner argues that because his trial attorney failed to issue a subpoena to Smith, and because of several erroneous rulings by the trial judge, he was unable to present this evidence critical to his defense.

In support of this claim, petitioner has filed a declaration wherein Smith sets forth his qualifications as an expert and describes the testimony he would have given had he been called as a witness at petitioner's trial. (Am. Pet., Ex. B.) Smith states in

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[5] Petitioner summarizes his defense theory as follows:

> Though Galvan and Acuna were present at the D Gas Station on February 17, 1995, at the time of the homicide, neither of them participated in the killing itself nor any planning to commit a homicide. Two individuals who went to the D Gas Station with Galvan and Acuna went inside the gas station's mini-mart while Galvan and Acuna remained outside in a vehicle. Presumably, said two individuals committed the homicide.

Points and Authorities in Support of Amended Petition (P&A) at 48.

his declaration that if a Norteno gang member were to ever "snitch" on a fellow gang member, he and/or his family would be subject to retaliation and even death, either in prison or on the streets. (*Id.* at 2.) Petitioner argues that "the trial court should have allowed [him] to present thorough, complete, and credible evidence concerning his involvement in the Norteno gang and the reasons why his involvement in the gang prevented him from disclosing the identities of the perpetrators." (P&A at 54.)

Petitioner's argument was rejected on direct appeal by the California Court of Appeal in a written decision. (Am. Answer, Ex. C.) The same argument was presented by petitioner in his petition for review which was summarily denied by the California Supreme Court. (Am. Answer, Ex. E.) In its decision the state appellate court fairly summarized the relevant background, as follows:

> When the prosecutor asked defendant on cross-examination for the names of the two men, defendant refused to reveal them because he was afraid of retribution from their gang. The court admonished defendant that if he persisted in his refusal to name them, his entire testimony would be stricken. Out of the jury's presence, defense counsel objected to the court's intended ruling to strike defendant's testimony and to admonish the jury. He explained he had an expert, Sacramento County Deputy Sheriff Lee Smith, currently a courtroom bailiff, who had previously worked in a gang unit. Smith knew

defendant and would explain the consequences of informing upon a fellow Norteno-Soreno. The court reconsidered upon the prosecutor's request, let the testimony stand[,] but instructed the jury that defendant's failure to reveal the names of the two men was "a credibility matter or circumstance" to consider "in weighing the testimony of this witness." The prosecution thereafter finished its cross-examination of defendant. The court recessed that Friday afternoon until Monday morning. The court stated to the parties that it wanted the prosecutor to have his rebuttal witnesses available for Monday as well as arguments Monday. Defense counsel was asked and responded that he had no additional witness "[a]s of right now" and Acuna's attorney had none.

On Monday morning, the prosecution recalled Esquivel who had previously testified that defendant was a Norteno gang member to explain whether he had seen defendant's backpack from which he had removed the gun. On cross-examination, Esquivel was then allowed over the prosecution's objection to testify that if a Norteno discloses the name of another Norteno in connection with a serious felony offense, the informer could be killed.

Outside the presence of the jury, the prosecutor complained that the defense was allowed to question Esquivel about gang retaliation when the prosecution thought the court had resolved to allow gang expert testimony if

Smith qualified and defense counsel would make an offer of proof. Defense counsel explained that due to the court's admonishment, Smith's testimony would go to defendant's credibility.

The court planned to hold an Evidence Code section 402 hearing to determine whether Smith qualified as an expert. Smith was ill that afternoon and unavailable to testify until the next morning (Tuesday). Defense counsel made an offer of proof. Smith, a former member of the Sacramento Gang Suppression Unit, would testify that if a Norteno gang member testified against another Norteno gang member, he and his family would suffer punishment, possibly death. Smith recognized defendant's street name and knew who he was. Defense counsel requested a continuance for the section 402 hearing until the next morning. The court initially denied the request for a continuance stating that the parties had already agreed to argue the case that afternoon, that Smith may or may not qualify as an expert, and that defendant had already testified he would suffer dire consequences if he revealed the names of the two men.

The prosecutor argued that defendant had failed to set forth a factual foundation showing relevance for a section 402 hearing. Defense counsel then asked for a ruling treating the offer of proof as the section 402 hearing. After an off-the-record discussion, the prosecutor stated that Smith had only

qualified as an expert on a prison gang but had "never been qualified as an expert in the area of Nortenos and Servanos [sic]." Defense counsel confirmed that Smith had "never qualified before." Defense counsel then represented that someone else, Ron Montez, would be available to testify as an expert that morning at 11:30 a.m.

After the prosecutor's criminalist testified, the prosecution rested. Defense counsel informed the court he had no evidence but wanted "to reserve our previous discussion about the 402 hearing for tomorrow morning." After an off-the-record conversation, defense counsel stated he had no witness available for 11:30 a.m. The court stated, "Subject to your 402 request, no other evidence?" Defense counsel responded, "No other evidence." Defense counsel agreed that he rested. Later, for the record, defense counsel noted that Montez had canceled and the section 402 hearing was with Smith. The court noted defense counsel's offer of proof showed that Smith had not qualified as an expert and was unavailable that date.

After the prosecutor made his opening argument and defense counsel made his closing argument, the court recessed for the evening.

The next morning prior to closing argument by Acuna's attorney, defense counsel, who appeared with Smith, renewed his request for a section 402 hearing and requested to reopen for Smith's testimony. Defense

> counsel stated that Smith had previously qualified as a gang expert and had agreed to testify without being subpoenaed. The court denied defense counsel's request.

(Opinion at 4-8.)

The California Court of Appeal did not reach the question of whether the trial court erred in denying petitioner's request for a continuance and/or to re-open the case to determine whether Mr. Smith was competent to testify as an expert. Instead, the appellate court concluded that any error in this regard was "harmless beyond a reasonable doubt." (*Id.* at 9.) The court explained its reasoning as follows:

> The jury heard Esquivel's uncontradicted testimony that a Norteno could be killed who pointed the finger at another member. Defendant was positively identified as one of the three men who ran out of the market with a gun. When he was arrested a short time after the crime, defendant had in his possession one of the weapons used in the crime. We see no possibility of a result more favorable to defendant had Smith been allowed to testify as to gang retaliation. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].)

(*Id.* at 9-10.)

In his petition for a writ of habeas corpus filed in the Sacramento County Superior Court after the California Court of Appeal had affirmed his judgment of conviction on appeal, petitioner argued that

witness Smith's declaration was "new information" which demonstrated that the trial court's [sic] committed prejudicial error in precluding Smith's testimony. The Superior Court rejected that argument, stating as follows:

> Petitioner is mistaken. Smith's declaration is only cumulative to what petitioner himself and witness Esquivel testified to at trial, that a gang member would endanger his life if he named another gang member as the perpetrator. The declaration does not reveal any constitutional error that strikes at the heart of the trial process, as is needed to get beyond the *Waltreus* bar. Nor does it show an error of constitutional magnitude that led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner, or that petitioner is actually innocent of the crime or crimes of which the petitioner is convicted, as is needed to get beyond the *Clark* bar. Eyewitness Christopher Annis testified that he saw petitioner run out of the market with a gun in his hand, and Smith's declaration contains nothing to refute that testimony.

(Am. Answer, Ex. G at 4.)

The California Court of Appeal and the Superior Court both assumed, without deciding, that the trial court erred in failing to grant petitioner a continuance under these circumstances. Both state courts proceeded directly to the question of whether petitioner suffered any prejudice as a result of the error.

The undersigned will take the same approach. In order to grant habeas relief where a state court has determined that a constitutional error was harmless, a reviewing court must determine: (1) that the state court's decision was "contrary to" or an "unreasonable application" of United States Supreme Court precedent with respect to harmless error, and (2) that the petitioner suffered prejudice under *Brecht v. Abrahamson,* 507 U.S. 619 (1993) from the constitutional error. *Inthavong v. LaMarque,* 420 F.3d 1055, 1059 (9th Cir. 2005), *petition for cert. filed* (Nov. 23, 2005).[6] Because both of these requirements must be satisfied before relief can be granted, a habeas court may address them in any order. *Id.* at 1061. The undersigned will first address whether petitioner suffered prejudice under *Brecht* as a result of the trial court's failure to grant a continuance to determine whether petitioner's expert witness would be allowed to testify.

On collateral review, an error is not "harmless" if it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht,* 507 U.S. at 637. In determining whether an error is harmless,

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[6] As recognized by the court in *Inthavong*, the Second Circuit has done away with the *Brecht* standard in light of the AEDPA and the Supreme Court's decision in *Mitchell v. Esparza*, 540 U.S. 12 (2003), while the Eighth Circuit has at least questioned *Brecht's* continued vitality. 420 F.3d at 1059 and n.2 & n.3 (citing *Zappulla v. New York*, 391 F.3d 462, 467, 474-75 (2d Cir. 2004); *Gutierrez v. McGinnis*, 389 F.3d 300, 306-07 (2d Cir. 2004); *Whitmore v. Kemna*, 213 F.3d 431, 433 (8th Cir. 2000)).

the question is "[']what effect the error had or reasonably may be taken to have had upon the jury's decision.'" *Wade v. Calderon,* 29 F.3d 1312, 1322 (9th Cir. 1994) (quoting *Brecht,* 507 U.S. at 642-43 (Stevens, J., concurring)), *overruled on other grounds by Rohan ex rel. Gates v. Woodford,* 334 F.3d 803, 815 (9th Cir. 2003). Accordingly, an error is not harmless if a reviewing court is "in grave doubt" as to whether the error had "substantial and injurious effect or influence." *O'Neal v. McAninch,* 513 U.S. 432, 435 (1995).

As explained by the California Court of Appeal and California Superior Court, evidence that petitioner might be subject to retaliation if he identified those he claimed were the actual perpetrators of the crime was cumulative of other evidence introduced at his trial. Specifically, petitioner himself testified that he could not identify the actual perpetrators because if he did, he was "going to be killed." (Reporter's Transcript on Appeal (RT) at 520.) Prosecution witness Anthony Esquivel corroborated petitioner's testimony on this point. (RT at 556-57.) In this regard, on cross-examination Esquivel testified as follows:

> Q. (By Mr. Holmes) What happens if one Norteno gives up a brother, another Norteno, for a serious felony offense; in other words, discloses his name?
>
> * * *

A. As far as I know he could be killed, you know, depending on where he's at, what happens, you know, the seriousness of the –

Q. (By Mr. Holmes) What about family members and things like that? Are they in jeopardy as well?

A. I assume they could be.

MR. HOLMES: Thank you.

THE COURT: I think we are in an area of speculation.

MR. HOLMES: That is all I have.

THE COURT: Mr. Bigelow?

MR. BIGELOW: No.

THE COURT: Obviously it's not influencing you, is it? You are telling the truth.

THE WITNESS: Yeah.

(*Id.* at 555-57.)

This testimony placed before the jury testimony from which they could conclude that petitioner could be subject to retaliation if he identified those he claimed were the actual perpetrators of the crime. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (the Constitution guarantees a criminal defendant a meaningful opportunity to introduce relevant evidence on his behalf). Petitioner now attempts to diminish the significance of this testimony, arguing that the jury may not have found it credible because he had an obvious motive to fabricate testimony in

support of his own defense and due to the trial judge's undermining of Esquivel's testimony by referring to it as "an area of speculation." This undersigned does not agree. The jury heard testimony from both petitioner and prosecution witness Anthony Esquivel that petitioner could not reveal the names of those gang members who he claimed committed the crime because his life would be in jeopardy if he did. The proposition that a gang member would be retaliated against if he provided information inculpating another gang member of a murder, is hardly a novel one nor was it controverted by any other evidence introduced at trial. Testimony to that effect did not need to be repeated for the third time, even by an "expert," in order to apprise the jury of its significance. It would have been obvious to the jury, if they believed petitioner's testimony that the two other men were the perpetrators, that petitioner would want to avoid directly implicating two street gang members for a murder of which petitioner had been accused for fear of retaliation. Certainly, the lack of expert testimony confirming the testimony of petitioner and Esquivel on this point did not prevent petitioner from presenting his defense of third-party culpability to the jury. That defense was presented by way of petitioner's own testimony and was argued by his counsel at trial. (*See* RT at 538-40, 668-71, 677-79.) The fact that the jury did not believe the defense does not mean that petitioner was prevented from presenting it.

Finally, as noted by the California Court of Appeal, the evidence against petitioner was substantial.

He was positively identified by an eyewitness as one of the persons who ran out of the liquor store after the shooting took place. The two guns involved in the crime were found, one on the ground next to the driver's order [sic] and the other under the car on the passenger side of a car driven by petitioner's co-defendant Acuna in which petitioner was riding as the passenger. Petitioner and Acuna each had cash on their persons at the time they were apprehended. Anthony Esquivel saw Acuna and petitioner in the getaway car on the morning of the crime and petitioner showed Esquivel one of the murder weapons at that time. Under these circumstances, the trial court's failure to grant a continuance of the trial in order to determine whether witness Smith would be allowed to testify on a point the jury had already heard testimony on did not render petitioner's trial fundamentally unfair or have an injurious effect on the verdict. *Brecht,* 507 U.S. at 637. Because petitioner has failed to demonstrate prejudice under the *Brecht* standard, he is not entitled to habeas corpus relief on this claim. *Inthavong,* 420 F.3d at 1062.

B. Jury Instruction Error

Petitioner raises several claims of jury instruction error. After setting forth the applicable legal principles, the court will analyze these claims in turn below.

1. Legal Standards

In general, a challenge to jury instructions does not state a federal constitutional claim. *See Middleton,* 768 F.2d at 1085 (citing *Engle,* 456 U.S. at 119); *Gutierrez v. Griggs,* 695 F.2d 1195, 1197 (9th Cir. 1983). In order to warrant federal habeas relief, the challenged jury instructions "cannot be merely 'undesirable, erroneous, or even "universally condemned,'" but must violate some due process right guaranteed by the fourteenth amendment." *Prantil v. California,* 843 F.2d 314, 317 (1988) (quoting *Cupp v. Naughten,* 414 U.S. 141, 146 (1973)). To prevail on such a claim petitioner must demonstrate "that an erroneous instruction 'so infected the entire trial that the resulting conviction violates due process.'" *Prantil,* 843 F.2d at 317 (quoting *Darnell v. Swinney,* 823 F.2d 299, 301 (9th Cir. 1987)). *See also Estelle,* 502 U.S. at 72. In making its determination, this court must evaluate the challenged jury instructions "'in the context of the overall charge to the jury as a component of the entire trial process.'" *Prantil,* 843 F.2d at 817 (quoting *Bashor v. Risley,* 730 F.2d 1228, 1239 (9th Cir. 1984)). Where the challenge is to a refusal or failure to give an instruction, the petitioner's burden is "especially heavy," because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe,* 431 U.S. 145, 155 (1977). *See also Villafuerte v. Stewart,* 111 F.3d 616, 624 (9th Cir. 1997).

2. Instruction on Reasonable Foreseeability

Petitioner argues that the trial court erred in failing to *sua sponte* give a jury instruction explaining the concept of "reasonable foreseeability." (Am. Pet. at 8; P&A at 54-57.) He argues that because the prosecution proceeded on the theory that petitioner could be found guilty of murder as a co-conspirator and/or an aider and abettor, the trial court was required to instruct the jury that in order to convict on a theory of derivative liability, it had to find that the homicide was reasonably foreseeable to petitioner at the time of his involvement in the robbery. (P&A at 54-55.) Petitioner states that, pursuant to state law, "reasonable foreseeability is a required element when the prosecution asks a jury to determine whether an aider and abettor is vicariously liable for, i.e., guilty of, crimes beyond those originally planned/contemplated." (*Id.* at 55.)

Respondent counters that the prosecution did not proceed on the theory that petitioner was guilty as a co-conspirator or as an aider and abettor. Rather, according to respondent, the prosecution theory was that petitioner and his co-defendant were guilty as principals. In support of this contention, respondent quotes the following comments by the prosecutor during his closing argument:

> Let me – let me stop there for a second, too, on this aiding and abetting point, folks. It is not our position that Acuna and Galvan were the aiders and the abetters. We are not

> asking you to find that these guys aided and abetted the real killers. These guys' guns were used. These guys are the killers. They did the robbery. They used the guns. This is the People's position.

(RT at 635.)

Petitioner's claim in this regard was raised for the first time in a petition for writ of habeas corpus filed in the California Superior Court, (Am. Answer, Ex. F.) That court found that the claim should have been, but was not, raised on appeal and was therefore barred under the holding in *In re Dixon,* 41 Cal. 2d 756, 759 (1953). (Am. Answer, Ex. G at 9.) The Superior Court also found that the claim was barred as untimely under the decision in *In re Clark,* 5 Cal. 4th 750 (1993). (*Id.*) Petitioner raised this claim again in a petition for writ of habeas corpus filed in the California Court of Appeal. (Am. Answer, Ex. H.) That petition was summarily denied. (Am. Answer, Ex I.) Petitioner then raised the claim in a petition for writ of habeas corpus filed in the California Supreme Court. (Am. Answer, Exs. J, K.) That petition was denied with a citation to *In re Waltreus,* 62 Cal. 2d 218, 225 (1965); *In re Dixon,* 41 Cal. 2d 756, 759 (1953); *In re Swain,* 34 Cal. 2d 300, 304 (1949); and *People v. Duvall,* 9 Cal. 4th 464, 474 (1995). (Am. Answer, Ex. L.)

Because the California courts denied this jury instruction claim on procedural grounds, there is no state court decision on the merits of this claim. When it is clear that a state court has not reached the

merits of a petitioner's claim, the AEDPA's deferential standard does not apply and a federal habeas court must review the claim de novo. *Menendez v. Terhune,* 422 F.3d 1012, 1026 (9th Cir. 2005); *Nulph v. Cook,* 333 F.3d 1052, 1056 (9th Cir. 2003). Accordingly, this court will review de novo petitioner's claim that the trial court erred when it failed to *sua sponte* give a jury instruction on the doctrine of reasonable foreseeability.

A review of the record reflects that, notwithstanding that portion of the closing argument quoted by respondent, the prosecutor at petitioner's trial did argue that petitioner could also be found guilty on a theory of aiding and abetting. (RT at 635.) In addition, petitioner's jury was instructed on the definition of aiding and abetting. (CT at 212-13, 219; RT at 621-22, 635.)[7]

As respondent points out, petitioner's jury found the special circumstance allegation that the murder was committed during the course of the robbery to be true. (CT at 183.) This finding required the jury to also find that petitioner was either the actual killer or an aider and abettor, and that he had the intent to kill. (CT at 220-21; RT at 624.)[8] In order to find that

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[7] The court notes that the jury was not instructed on the law relating to conspiracy.

[8] In this regard, petitioner's jury was instructed in relevant part as follows with respect to the special circumstance alleging that the murder was committed during the commission of the robbery:

(Continued on following page)

petitioner was an aider and abettor, the jury was required to find that petitioner aided, promoted, instigated, or encouraged the crime "with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating the commission of the crime." (RT at 621.) The jury was also instructed that "mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (*Id.* at 622.) These instructions, read together, required the jury to find that petitioner either committed the murder himself or actually intended and aided the murder at the time it was committed. *See People v. Coffman,* 34 Cal. 4th 1, 107-08 (2005) ("Moreover, by finding true the special circumstance allegations against Coffman, the jury in this case necessarily found she possessed the intent to kill."), *cert. denied* ___ U.S. ___ 125 S.Ct. 2517 (2005). Under these circumstances, the omission of an instruction

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> If you find beyond a reasonable doubt that the defendant was either the actual killer or an aider and abetter, but you are unable to decide which, then you must also find beyond a reasonable doubt that the defendant with intent to kill aided and abetted an actor in commission of the murder in the first degree in order to find the special circumstance to be true.
>
> On the other hand, if you find beyond a reasonable doubt that the defendant was the actual killer, you need not find that the defendant intended to kill a human being in order to find the special circumstance to be true.

(CT at 220-21; RT at 624.)

that the murder must have been reasonably foreseeable to petitioner at the time of the robbery did not render petitioner's trial fundamentally unfair. The jury clearly found, at a minimum, that the murder was reasonably foreseeable to petitioner at the time it was committed because it found the special circumstance to be true.

Petitioner argues that the jury finding on the special circumstance does not end the inquiry. He contends that the jury might not have found the special circumstance allegation true had it not been for the other constitutional violations at his trial. Petitioner further argues that if the jury had found the special circumstance not true, the prosecution would have had to demonstrate

> whether [petitioner] was involved in any planning concerning the robbery/murder, and whether the homicide was reasonably foreseeable to [petitioner]. Since the prosecution presented no evidence of planning, it is, at a minimum, reasonably foreseeable that the jury would not have found [petitioner] guilty under a derivative liability theory had it not been for the trial court's instructional omission and the other constitutional errors discussed herein.

(P&A at 57.)

Petitioner's argument that the jury might have found the special circumstance allegation not to be true is based on pure speculation. After a review of the record, and for the reasons described above, this

court concludes that petitioner's trial was not rendered fundamentally unfair because of the failure of the trial court to *sua sponte* give a reasonably foreseeability instruction. Accordingly, petitioner is not entitled to relief on this claim.

3. Instruction on Third Party Culpability

Petitioner next claims that the trial court's failure to give a jury instruction on "third party culpability" rendered his trial fundamentally unfair. In support of this claim, petitioner refers the court to his arguments on direct appeal. (P&A at 60.)

The state court record reflects that petitioner requested the following jury instruction on third party culpability:

> You have heard evidence that other persons were involved in this charged crime. It is not required that the defendant prove this fact beyond a reasonable doubt. Defendant is entitled to an acquittal if the evidence raises a reasonable doubt in your minds as to the defendants' guilt. Such evidence may by itself raise a reasonable doubt as to the defendants' guilt. However, its weight and significance, if any, are matters for your determination. If after consideration of this and all of the other evidence, you have a reasonable doubt that the defendant(s) committed [t]his offense, you must give the defendant(s) the benefit of the doubt and find him/them not guilty.

(CT at 239.) The trial court refused to give this instruction without explanation. (*Id.*) Citing California caselaw, petitioner argued on direct appeal that "when third party culpability evidence has been admitted at trial, the defense has the right to an instruction pinpointing the theory and instructing the jury on how to relate the evidence of that defense to the prosecution's general burden of proving guilt beyond a reasonable doubt." (Am. Answer, Ex. A at 31.) Petitioner also argued that CALJIC 2.11.5, given at his trial and quoted below, undermined the value of his defense theory because "it contributed to the impression created by the trial court that [petitioner's] testimony was untrustworthy and should be disregarded." (*Id.* at 32)

After summarizing California law with respect to a defendant's right to a "pinpoint" jury instruction, the California Court of Appeal rejected petitioner's argument in this regard, reasoning as follows:

> The jury was instructed in the language of CALJIC No. 2.11.5: "There has been some evidence in this case indicating that a person other than the defendants was or may have been involved in the crime for which the defendants are here on trial. There may be many reasons why such person is not here on trial; therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he or she has been or will be prosecuted. Your duty is to decide whether the People have proved the guilt of the defendants on

> trial." Although defendant asserts the instruction "essentially undermined the legal value of [his] theory of the case," he acknowledges that the instruction has been approved because it "does not tell the jury it cannot consider evidence that someone else *committed* the crime." (*People v. Farmer* (1989) 47 Cal.3d 888, 918-919, original italics.) Defendant's proposed instruction was repetitious of instructions already given (CALJIC No. 2.11.5; CALJIC No. 2.90 [reasonable doubt instruction]) and the trial court properly refused it. (*Wright, supra,* 45 Cal.3d at p. 1134.)
>
> Assuming any error, it was harmless. (*People v. Adrian* (1982) 135 Cal.App.3d 335, 341-342.) The jury heard the evidence and the argument that an unnamed person or persons committed the crimes. The prosecution evidence established that three men ran out of the market. Even if the jury believed defendant that the two unnamed men committed the crimes, the jury could have found defendant was the third man who was seen running out of the market. Even if the jury believed defendant stayed in the car, he could still be convicted under an aiding and abetting theory for acting as a lookout.

(Opinion at 11-12.)

After a review of the record, the undersigned concludes that the lack of a pinpoint instruction did not prevent petitioner from presenting his theory of the defense nor did it otherwise render his trial fundamentally unfair. The substance of petitioner's

proposed jury instruction was covered in other jury instructions given at his trial. Specifically, the jury was instructed that petitioner must be acquitted if there was a reasonable doubt about his guilt. (RT at 614, 621.) The jury was also reminded that there was evidence introduced suggesting that other persons may have been involved in the crime. (*Id.* at 616.) These instructions adequately permitted jury consideration of the defense case. In addition, petitioner testified in support of his defense that two other men committed the murder. The Annis brothers testified that petitioner was accompanied by at least two other persons, and maybe three. In short, the jury was aware that other persons may have committed the murder and was instructed that petitioner could not be found guilty if there was a reasonable doubt about his guilt. This was the essence of petitioner's proposed jury instruction. The jury simply rejected petitioner's version of the events, finding that both petitioner and his co-defendant personally used a firearm in the commission of both offenses. Under these circumstances, petitioner has failed to sustain his "heavy" burden of demonstrating that the omission of his requested "pinpoint" jury instruction resulted in a federal due process violation. Accordingly, he is not entitled to relief on this claim.[9]

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[9] Petitioner's argument, if any, that the lack of a pinpoint instruction violated California law is not cognizable in this federal habeas corpus proceeding. *Middleton*, 768 F.2d at 1085.

4. Instructions on Voluntary Intoxication

Petitioner claims that the trial court erred in refusing to give two jury instructions regarding the effect of voluntary intoxication on specific intent. (Am. Pet. at 8; P&A at 60.) In this regard, petitioner again refers the court to the arguments he presented on direct appeal in state court. (P&A at 60; Am. Pet., Ex. A at 35-40.)

Petitioner requested two jury instructions on the effects of voluntary intoxication on intent. (RT at 610.) First, petitioner refers this court the "standard" instruction which reads as follows:

> In the crimes of murder and robbery, of which the defendant Galvan is accused in Counts I and II, a necessary element is the existence in the mind of the defendant of the specific intent to permanently deprive a person of property in his possession taken from his immediate presence against his will by force or fear. [¶] If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining whether defendant had such specific intent. [¶] If from all the evidence you have a reasonable doubt whether the defendant formed such specific intent, you must find that he did not have such specific intent.

(*Id.*; Am. Answer, Ex. A at 35 n.6.) On appeal, petitioner argued that he was entitled to this instruction "both to negate the specific intent for robbery and the

specific intent to aid and abet," (Am. Answer, Ex. A at 36.)

Petitioner's second proposed instruction stated as follows:

> You have heard evidence of intoxication of two individuals who were involved with the killing of the victim. You may consider this state of intoxication as to their ability to formulate the specific intent to rob said victim. You may further consider this state of intoxication as to any lesser degree of homicide in the event you fail to find a robbery has been committed beyond a reasonable doubt."

(CT at 238.) Petitioner requested that this instruction be given "as to the [unnamed] perpetrators." (RT at 610.) The trial court refused to give both instructions on the grounds that there was no evidence except petitioner's testimony to indicate he was intoxicated at the time of the crimes, and that the defense of voluntary intoxication was inconsistent with petitioner's defense of third party culpability. (Am. Answer, Ex. A at 36; CT at 239; RT at 610.)

On appeal, petitioner argued that his trial testimony that he had been "drinking all day" and that he called in sick to work because he was "a little buzzed" was sufficient to require the trial court to give jury instructions on voluntary manslaughter, even though a defense based on lack of intent was inconsistent with his defense of "non-participation." (Am. Answer,

Ex. A at 37.) Petitioner summed up his argument as follows:

> While the jury may have chosen to disbelieve appellant's testimony regarding third party liability, particularly in light of the court's treatment of the evidence as discussed *ante*, it may have considered his testimony regarding voluntary intoxication truthful. Regardless of appellant's proffer of a third party culpability defense, the prosecution was required to prove beyond a reasonable doubt that he had the specific intent to commit robbery in order to obtain convictions for robbery and felony murder or to assist the actual perpetrators if the jury believed appellant's testimony. Because the prosecution also presented the theory that appellant had specific intent to commit murder and the jury was so instructed, appellant was entitled, at his request, to instruct the jury that evidence of his voluntary intoxication may have prevented him from forming the requisite specific intent to commit those crimes.

(*Id.* at 39.)

The California Court of Appeal rejected these arguments on appeal based upon the following reasoning:

> "The fact that a defendant has been drinking, without evidence that he became intoxicated thereby, provides no basis for an instruction on intoxication." (citations omitted).

> Defendant testified that around noon, he and Acuna bought a 12-pack of beer which they shared with two other men. They purchased another 12-pack of beer which was consumed by the four men. Defendant decided he was "a little buzzed" from drinking and did not "feel like going to work." The robbery/murder occurred at about 3:45 p.m. Defendant was arrested at about 4:30 p.m.
>
> "[W]hen there is no evidence from which a jury could conclude that as a result of voluntary intoxication the defendant failed to from the requisite criminal intent or attain the requisite mental state, instructions on the defense of voluntary intoxication may properly be refused. [Citations.]" (*Williams, supra,* 45 Cal.3d at p. 1311.) That situation obtains here. The trial court properly refused defendant's requested instructions.

(Opinion at 13-14.)

Petitioner was charged with specific intent crimes. Because voluntary intoxication may be a defense to a specific intent crime, petitioner had a legal basis for seeking a jury instruction on voluntary intoxication. *See United States v. Martinez-Martinez,* 369 F.3d 1076, 1082 (9th Cir. 2004); *United States v. Sneezer,* 983 F.2d 920, 922 (9th Cir. 1992); *see also United States v. Gracidas-Ulibarry,* 231 F.3d 1188, 1195 (9th Cir. 2001). The United States Supreme Court has held that "[a]s a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence

sufficient for a reasonable jury to find in his favor." *Mathews v. United States,* 485 U.S. 58, 63 (1988). *See also United States v. Escobar de Bright,* 742 F.2d 1196, 1198 (9th Cir. 1984) ("The general principle is well established that a criminal defendant is entitled to have a jury instruction on any defense which provides a legal defense to the charge against him and which has some foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility.") This same standard applies to habeas petitions arising from state convictions. *Bradley v. Duncan,* 315 F.3d 1091, 1097 (9th Cir. 2002); *Conde v. Henry,* 198 F.3d 734, 739 (9th Cir. 1999) ("It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case."). A due process deprivation warranting habeas relief occurs when the failure to give an instruction precludes the jury from considering a viable theory of defense (*see Bashor v. Risley,* 730 F.2d 1228, 1240 (9th Cir. 1984), or if the evidence warrants such an instruction under state law (*see Miller v. Stagner,* 757 F.2d 988, 993 (9th Cir. 1985). Of course, a requested instruction on voluntary intoxication is properly denied where there is insufficient foundation in the evidence to show that a defendant's alcohol use made it impossible to form the requisite intent. *United States v. Washington,* 819 F.2d 221, 225 (9th Cir. 1987) (requested jury instruction on voluntary instruction properly denied where slight evidence of alcohol consumption did not support defendant's lack of intent and intoxication defenses); *see also United States v. Nacotee,* 159 F.3d 1073,

1076-77 (7th Cir. 1998) (same); *Sanders v. Jones*, 1994 WL 118260, *3 (N.D. Cal. March 11, 1994) (trial court properly found that petitioner did not present sufficient evidence to support a voluntary intoxication instruction where he presented no evidence of how much he had consumed over what period of time, failed to call an expert witness on the issue and seemed to recall the events of the incident in his trial testimony). Thus, in order to be entitled to a jury instruction on voluntary intoxication a criminal defendant must present evidence: (1) that he was intoxicated, and (2) that his intoxication precluded him from forming the specific intent necessary to commit the crime in question. *Washington*, 819 F.2d at 225.

Here, petitioner presented "some evidence" of his consumption of alcohol on the day of the shooting through his own trial testimony. However, petitioner's testimony did not suggest that his use of alcohol precluded him from forming the specific intent necessary to commit the crimes of robbery or of being an alder and abettor to a murder. Petitioner presented no evidence regarding how much alcohol he consumed over any specified period of time, nor did he call an expert to testify regarding the effect of alcohol consumption on his ability to form malice. Without such evidentiary support in the record, the trial court was not required to give a voluntary intoxication instruction. The opinion of the state appellate court to the same effect is not contrary to or an unreasonable application of federal law. Nor has petitioner

established that the failure to give a voluntary intoxication instruction so infected his trial that the resulting conviction violated due process. Accordingly, petitioner is not entitled to relief on this claim.

C. Judicial Bias

Petitioner's next claim is that his due process right to a fair trial was violated because the trial judge was biased against him and sabotaged the presentation of his defense. Specifically, petitioner alleges that the trial judge, in the presence of the jury, belittled petitioner's testimony and the testimony of Anthony Esquivel; had "little patience" for petitioner's defense of third party culpability; and improperly refused to grant a continuance for the purpose of allowing the defense to secure the testimony of expert witness Smith. (P&A at 59.) Petitioner also argues that the trial judge's mannerisms, body language, and expressions "betrayed the judge's lack of belief in and patience for [petitioner's] defense." (*Id.* at 59-60.) Finally, petitioner contends that the circumstances surrounding the denial of his state habeas petition in the California Superior Court raise "questions concerning the trial judge's partiality." (*Id.* at 60.)

Petitioner has filed his own declaration in support of his claim of judicial bias. (Am. Pet., Ex. Q.) Therein, petitioner declares that during trial, and especially during his own testimony and the testimony of Anthony Esquivel, the trial judge often had

"exasperated expressions on his face," which included exhibiting a red face and displaying his anger. (*Id.*) Petitioner also declares that the judge's body language indicated he was uncomfortable with petitioner's testimony and did not believe it. (*Id.*)

"The Due Process Clause entitles a person to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980). In addition, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). As stated by the United States Supreme Court:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

In re Murchison, 349 U.S. 133, 136 (1955). *See also Taylor v. Hayes*, 418 U.S. 488 (1974). A trial judge "must be ever mindful of the sensitive role [the court] plays in a jury trial and avoid even the appearance of advocacy or partiality." *Kennedy v. Los Angeles Police Dept*, 901 F.2d 702, 709 (9th Cir. 1989), *overruled on other grounds by Hunter v. Bryant*, 502 U.S. 224 (1991) (quoting *United States v. Harris*, 501 F.2d 1, 10 (9th Cir. 1974)).

To sustain a claim of judicial bias, "there must be an 'extremely high level of interference' by the trial judge that creates 'a pervasive climate of partiality and unfairness.'" *Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir. 1995) (quoting *United States v. DeLuca*, 692 F.2d 1277, 1282 (9th Cir. 1982)). *See also In re Murchison*, 349 U.S. at 136 (judicial bias resulted in a denial of due process where the same judge who had sat as the 'grand jury' before which witnesses had testified also presided at a contempt hearing at which those witnesses were adjudged in contempt for their previous conduct before the judge); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (violation of due process where judge had a direct personal pecuniary interest in convicting the defendant who came before him for trial). However, in attempting to make out a claim of unconstitutional bias, a plaintiff must "overcome a presumption of honesty and integrity" on the part of decision-makers, *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Finally, if a criminal defendant is tried by an impartial adjudicator, reversal is required without consideration of whether the error was harmless. *Neder v. United States*, 527 U.S. 1, 8 (1999); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (denial of "right to an impartial adjudicator, be it judge or jury" can never be harmless error) (citation omitted).

A review of the record does not support petitioner's claim that the trial judge's rulings reflected any personal bias or animosity towards petitioner, his counsel, or petitioner's defense to the charges against him. As discussed above, the judge's decision not to

grant a continuance for the purpose of determining whether Mr. Smith was qualified to testify as an expert regarding petitioner's fear of retribution, was based in large part on the fact that two other witnesses had testified to essentially the same effect. There is no evidence that the trial judge's ruling was based on any personal animosity towards petitioner or his defense. Moreover, as discussed above, the trial judge's rulings on jury instruction issues did not violate petitioner's right to a fair trial.

Petitioner also questions the circumstances under which his petition for writ of habeas corpus filed in the California Superior Court was addressed. The state court record reflects that on June 8, 1999, petitioner's habeas petition was transferred for decision to Honorable John V. Stroud, petitioner's trial judge, after originally having been assigned to another judge. (Am. Pet., Ex. J.) On June 9, Judge Stroud issued a nine-page opinion rejecting petitioner's claims. (Am. Answer, Ex. G.) On June 16, 1999, petitioner filed an application seeking disqualification of Judge Stroud from acting as the judge in the habeas proceeding on the grounds that the petition challenged the judge's trial rulings and his bias and impartiality. (Am. Pet., Ex. K.) On June 23, 1999, Judge Stroud issued an order striking petitioner's application to disqualify as untimely, pursuant to Cal, Code Civ. Proc. § 170.4(b) ("if a statement of disqualification is untimely filed . . . the trial judge against whom it was filed may order it stricken").

Petitioner argues that the orders denying his state habeas petition and striking the application to disqualify were erroneous and "contrary to law." (P&A at 14-22.) Other than this argument, petitioner does not elaborate on his contention that these events provide support for his argument that Judge Stroud was an impartial adjudicator at his trial. Petitioner relies on the decision in *Tumey v. Ohio* in support of his claim of judicial bias. However, the circumstances in petitioner's case are not [at] all similar to those confronted by the Supreme Court in *Tumey* where the trial judge was found to have a pecuniary interest in convicting defendant of the charged crimes. 273 U.S. at 523 ("[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.")

After a review of the relevant documents, this court does not find support for petitioner's claim of judicial bias in the circumstances surrounding the denial of his petition for writ of habeas corpus by the California Superior Court. The Superior Court's denial of the habeas petition was affirmed by both the California Court of Appeal and the California Supreme Court. There is no indication that the referral of the state habeas petition to the trial judge was improper in any way. Further, the motion for disqualification was moot at the time it was filed because a decision on the habeas petition had already

been issued. Under the circumstances, there appears to be no violation of federal law in the state court's handling of petitioner's petition for writ of habeas corpus.

In sum, petitioner's argument that the trial judge's actions were motivated by personal antagonism is not supported by the record. Even if, as alleged by petitioner, the judge appeared exasperated at times during trial with the testimony of some witnesses, a review of the record does not reflect conduct that was so extreme as to create a pervasive climate of unfairness. Accordingly, petitioner is not entitled to relief on this claim.

D. Ineffective Assistance of Counsel

Petitioner raises two claims of ineffective assistance of counsel. His first such claim is that his defense counsel effectively abandoned him, resulting in a constructive denial of his Sixth Amendment right to counsel. His second claim is that his trial counsel has engaged in a pattern and practice of providing his clients in criminal cases with constitutionally inadequate representation and that he provided petitioner with prejudicially ineffective assistance of counsel at his trial. Petitioner also alleges that his appellate counsel rendered ineffective assistance in failing to challenge on appeal the trial court's failure to give a reasonable foreseeability jury instructions. After setting forth the applicable legal principles, the court will analyze these claims in turn below.

1. Legal Standards

The Sixth Amendment guarantees the effective assistance of counsel. The United States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668 (1984). To support a claim of ineffective assistance of counsel, a petitioner must first show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. *See Strickland,* 466 U.S. at 687-88. After a petitioner identifies the acts or omissions that are alleged not to have been the result of reasonable professional judgment, the court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally, competent assistance. *Id.* at 690; *Wiggins v. Smith,* 539 U.S. 510, 521 (2003).

Second, a petitioner must establish that he was prejudiced by counsel's deficient performance. *Strickland,* 466 U.S. at 693-94. Generally, a petitioner must demonstrate actual prejudice, or a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id. See also Williams,* 529 U.S. at 391-92; *Laboa v. Calderon,* 224 F.3d 972, 981 (9th Cir. 2000). This showing of prejudice is required in cases involving claims of ineffective assistance of counsel both at trial or on appeal. *Id.* at 693. A reviewing court "need not determine whether counsel's performance was

deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed," *Pizzuto v. Arave,* 280 F.3d 949, 955 (9th Cir. 2002) (quoting *Strickland,* 466 U.S. at 697).

In assessing an ineffective assistance of counsel claim "[t]here is a strong presumption that counsel's performance falls within the 'wide range of professional assistance.'" *Kimmelman v. Morrison,* 477 U.S. 365, 381 (1986) (quoting *Strickland,* 466 U.S. at 689). There is in addition a strong presumption that counsel "exercised acceptable professional judgment in all significant decisions made." *Hughes v. Borg,* 898 F.2d 695, 702 (9th Cir. 1990) (citing *Strickland,* 466 U.S. at 689). However, that deference "is predicated on counsel's performance of sufficient investigation and preparation to make reasonably informed, reasonably sound judgments." *Mayfield v. Woodford,* 270 F.3d 915, 927 (9th Cir. 2001) (en banc)).

Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691. "This includes a duty to . . . investigate and introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that question to undermine confidence in the verdict." *Bragg v. Galaza,* 242 F.3d 1082, 1088 (9th Cir. 2001) (citing *Hart v. Gomez,* 174 F.3d 1067, 1070 (9th Cir. 1999)). Counsel must, "at a minimum,

conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." *Hendricks v. Calderon,* 70 F.3d 1032, 1036 (9th Cir. 1995) (quoting *Sanders v. Ratelle,* 21 F.3d 1446, 1456 (9th Cir. 1994); internal citation and quotations omitted). On the other hand, where an attorney has consciously [sic] decided not to conduct further investigation because of reasonable tactical evaluations, his or her performance is not constitutionally deficient. *See Siripongs v. Calderon,* 133 F.3d 732, 734 (9th Cir. 1998); *see also Babbitt v. Calderon,* 151 F.3d 1170, 1173 (9th Cir. 1998). "A decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.'" *Wiggins,* 539 U.S. at 533 (quoting *Strickland,* 466 U.S. at 691).

The *Strickland* standards apply to appellate counsel as well as trial counsel. *Smith v. Robbins,* 528 U.S. 259, 285 (2000); *Smith v. Murray,* 477 U.S. 527, 535-36 (1986); *Miller v. Keeney,* 882 F.2d 1428, 1433 (9th Cir. 1989). However, an indigent defendant "does not have a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes,* 463 U.S. 745, 751 (1983). Counsel "must be allowed to decide what issues are to be pressed." *Id.* Otherwise, the ability of counsel to present the client's case in accord with counsel's professional evaluation would be "seriously undermined." *Id. See also Smith v. Stewart,* 140 F.3d 1263, 1274 n.4 (9th Cir. 1998) (counsel not required to file "kitchen-sink

briefs" because it "is not necessary, and is not even particularly good appellate advocacy.") Further, there is, of course, no obligation to raise meritless arguments on a client's behalf. *See Strickland,* 466 U.S. at 687-88 (requiring a showing of deficient performance as well as prejudice). Thus, counsel is not deficient for failing to raise a weak issue. *See Miller,* 882 F.2d at 1434. In order to demonstrate prejudice with respect to a claim of ineffective assistance by appellate counsel, petitioner must demonstrate that but for counsel's errors he probably would have prevailed on appeal. *Miller,* 882 F.2d at 1434 n.9.

2. Trial Counsel

a. Constructive Denial of Right to Counsel

Citing *United States v. Cronic*, 466 U.S. 648, 658 (1984), petitioner claims that his trial counsel "effectively abandoned" him during pre-trial proceedings and trial, thereby denying him his Sixth Amendment right to the assistance of counsel. (P&A at 4.) Specifically, petitioner alleges that his trial counsel: (1) had no communication with petitioner for thirteen of the sixteen months that he represented petitioner; (2) devoted only 1.5 hours to trial preparation; (3) did not file any pre-trial motions; (4) did not conduct any "meaningful" investigation; (5) did not incur any expenses on petitioner's behalf; (6) failed to review "pertinent discovery;" and (7) claimed to have lost his trial file after the conclusion of the case. (*Id.* at 5.) Petitioner also contends that his trial counsel did not

have any out-of-court discussions with the prosecutor or the attorney for co-defendant Acuna and did not interview any witnesses. Petitioner notes that at a pre-sentencing hearing on his motion to relieve his trial counsel, counsel conceded that because he was working on several trials, he "didn't have a lot of time to spend with [petitioner] leading up to the pretrial stuff." (*Id.* at 6.) Petitioner argues that, because of trial counsel's failure to expend any significant effort on his behalf, he was "actually or constructively denied his right to counsel." (*Id.* at 26.) He asserts that prejudice may be presumed under such circumstances.

This claim was raised for the first time in petitioner's petition for a writ of habeas corpus filed with the California Supreme Court. (Am. Answer, Ex. K.) The petition was denied with citation to *In re Waltreus,* 62 Cal. 2d 218, 225 (1965); *In re Dixon,* 41 Cal. 2d 756, 759 (1953); *In re Swain,* 34 Cal. 2d 300, 304 (1949); and *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). (Am. Answer, Ex. L.) Because the California courts denied petitioner's claim of a constructive denial of counsel on procedural grounds, there is no state court decision on the merits of this claim. Accordingly, this court will review de nova petitioner's claim of constructive denial of counsel. *Menendez v. Terhune*, 422 F.3d at 1026; *Nulph*, 333 F.3d at 1056.

In *Cronic* the United States Supreme Court "acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed." *Stano v. Dugger*, 921 F.2d

1125, 1152 (11th Cir. 1991) (en banc) (citing *Cronic*, 466 U.S. at 658). These circumstances are limited, however, to situations where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," thereby rendering the adversary process itself presumptively unreliable. *Pizzuto v. Arave*, 280 F.3d 949, 958 (9th Cir. 2002) (quoting *Cronic*, 466 U.S. at 659). *See also Young v. Runnels*, 435 F.3d 1038, 1042 (9th Cir. 2006). In making this determination, the totality of counsel's efforts must be examined, "not just part of them in isolation." *Gerlaugh v. Stewart*, 129 F.3d 1027, 1036 (9th Cir. 1977). *See also Bell v. Cone*, 535 U.S. 685, 697 (2002) (emphasizing that *Cronic's* exception for failing to test the prosecution's case applies when the attorney's failure to oppose the prosecution goes to the proceeding as a whole – not when the failure occurs only at specific points in the trial); *Florida v. Nixon*, 543 U.S. 175, 188 (2004) (counsel's guilt phase concession of guilt did not automatically constitute deficient performance since petitioner still had the rights to which he was entitled at trial – to have the prosecution prove the elements of the offense beyond a reasonable doubt by competent, admissible evidence; to cross-examine witnesses; to exclude prejudicial evidence; and to appeal evidentiary or instructional errors); *United States v. Thomas*, 417 F.3d 1053, 1057-58 (9th Cir. 2005) (defense counsel's concession of defendant's guilt on one charge in order to enhance defendant's credibility while attempting to avoid conviction on other charges did not rise to level of an entire failure

to subject prosecution's case to meaningful adversarial testing, such that counsel's performance, assuming that it was deficient, was presumptively prejudicial).

After a review of the entire record, including the record of the evidentiary hearing held in this court, the undersigned concludes that petitioner has failed to substantiate his claim that he suffered a constructive denial of his right to counsel. While trial counsel's performance may be subject to question in certain specific respects, it did not approach the level of a complete failure of counsel to provide representation as would be required to justify a finding of presumed prejudice. *See, e.g., Cronic*, 466 U.S. at 660-61 & n. 28 (prejudice presumed where counsel actively represents conflicting interests or where "circumstances made it so unlikely that any lawyer could provide effective assistance"); *Strickland,* 466 U.S. at 692 (prejudice presumed where state interferes with counsel's assistance); *Plumlee v. Ignacio,* 426 F.3d 1095 (9th Cir. 2005) (prejudice presumed where level of mistrust between defendant and his attorney was so extreme that defendant was deprived of "any representation at all"); *Delgado v. Lewis*, 223 F.3d 976, 980 (9th Cir. 2000) (the "Sixth Amendment right to counsel, of course, guarantees more than just a warm body to stand next to the accused during critical stages of the proceedings" (quoting *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1015 (9th Cir. 1988)); *Frazer v. United States*, 18 F.3d 778, 785 (9th Cir. 1994) (if trial counsel verbally assaulted his

client with a racial epithet and threatened to perform ineffectively if client insisted on proceeding to trial, prejudice would be presumed because the alleged statements would be too extortionate to qualify as the assistance of counsel); *Tucker v. Day,* 969 F.2d 155, 159 (5th Cir. 1992) (attorney merely "stood in" during sentencing); *United States v. Swanson,* 943 F.2d 1070 (9th Cir. 1991) (in closing argument, counsel conceded there was no reasonable doubt as to his client's guilt); *Javor v. United States,* 724 F.2d 831, 834-35 (9th Cir. 1984) (attorney slept through a portion of the trial); *Osborne v. Shillinger,* 861 F.2d 612, 629 (10th Cir. 1988) (attorney "acted with reckless disregard for his client's best interest and, at times, apparently with the intention to weaken his client's case").

Here, petitioner's trial counsel actively represented petitioner from the time he was first appointed through sentencing. The record reflects that counsel met with petitioner several times to discuss his case, hired an investigator, drafted motions, conducted adequate direct and cross-examination of witnesses, presented a defense based on petitioner's version of the events, and adequately argued the defense case in his closing argument to the jury. Although trial counsel may not have met with petitioner in the jail for thirteen of the sixteen months he represented petitioner, he explained at the evidentiary hearing on petitioner's motion to relieve counsel that his investigator spoke to petitioner numerous times during that same period, and that counsel met with petitioner during breaks at court appearances

and the trial. (Reporter's Transcript of Evidentiary Hearing, at 23-24, 34-35, 37, 39-40, 91-100.)

While petitioner generally faults his trial counsel for failing to devote sufficient hours to trial preparation, the record reflects that counsel was adequately prepared for trial. Further, although counsel did not file any pretrial motions, he explained at the evidentiary hearing that a motion he drafted to preclude the striking of petitioner's testimony was rendered moot by the prosecutor's decision not to request that the testimony be stricken. (*Id.* at 103.)[10] Counsel testified that after receiving a lab analysis report indicating that petitioner's blood alcohol level was only .06%, he realized that a defense based on petitioner's level of intoxication [w]as not particularly viable. (*Id.* at 120.) Moreover, contrary to petitioner's claim that his trial counsel did not have any pre-trial discussions with the prosecutor, the transcript of the preliminary hearing reflects that counsel spoke with the prosecutor about the case "on a number of occasions." (*Id.* at 108.) Trial counsel testified that he reviewed potential jury instructions, requested certain specific instructions, and made notes during jury voir dire. (*Id.* at 109-113.) Petitioner's trial counsel also testified that he visited the scene of the crime with his

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[10] The record reflects that petitioner's trial counsel also prepared and filed two post-trial motions. (CT 241-49; 262-64; 265-69; RT 103-05.) Those motions, a motion for a new trial and a motion for release of juror information, were both denied. (CT 7; RT 103-05.)

investigator, considered the facts of the case and petitioner's version of what had occurred, and presented the best defense he could under the circumstances. (*Id.* at 19-24, 31-33, 66-67.) Counsel explained that it was customary to have no contact with his client from the time of the verdict until the day before sentencing because he "wait[ed] until we get the probation report, then we interview them with the probation report and the recommendations, then we go into – at that time if we need time for new trial motion or whatever we ask for time at that point." (*Id.* at 51.)

A careful review of the record reflects that petitioner's trial counsel "subject[ed] the prosecution's case to meaningful adversarial testing" by virtue of his efforts on petitioner's behalf. *See Cronic*, 466 U.S. at 659. Accordingly, petitioner is not entitled to relief on his claim that he was constructively denied his Sixth Amendment right to counsel.

b. Pattern and Practice/Ineffective Assistance of Counsel at Trial

In his next claim of ineffective assistance of trial counsel, petitioner alleges that his trial attorney engaged in a "pattern and practice" of providing ineffective assistance to his clients facing criminal charges and that, consistent with that practice, he provided ineffective assistance to petitioner. With respect to counsel's performance during trial, petitioner specifically claims that his trial counsel

improperly: (1) failed to spend sufficient time with petitioner prior to trial; (2) failed to obtain the testimony of a witness who saw petitioner with the two actual perpetrators of the homicide immediately prior to the shooting; (3) failed to issue a subpoena to witness Lee Smith; (4) failed to present evidence concerning the weaknesses in the eyewitness identifications of petitioner by two prosecution witnesses; (5) failed to present evidence of petitioner's intoxication at the time of his arrest which would have explained his conduct; (6) failed to review a damaging videotape depicting petitioner's post-arrest interview with the police and failed to mention the tape to petitioner at any time prior to trial; and (7) failed to adequately cross-examine prosecution witnesses Allen and Christopher Annis. (Am. Pet. at 7; P&A at 8.) Petitioner explains that "for organizational purposes, trial counsel's deficiencies can be categorized as [A] a failure to adequately investigate and prepare for trial, [B] a failure to perform competently during trial, [C] a failure to perform competently in proceedings in the trial court after the jury rendered its verdicts, and [D] trial counsel's pattern and practice of deficient representation – a pattern and practice which was manifest throughout the course of counsel's representation of [petitioner]." (P&A at 32.) Petitioner specifies trial counsel's failures in more detail as set forth below.

i. Failure to Adequately Investigate and Prepare

Petitioner contends that his trial counsel failed to investigate and prepare for trial in that he: (1) visited petitioner only five times between the time of his arrest and his trial seventeen months later; (2) failed to find and investigate a gas station attendant who saw petitioner, Acuna, and two other persons in a dark vehicle when they purchased gasoline shortly before the homicide; (3) failed to find and investigate a young girl who saw "four or five" Hispanic males in a vehicle and directed them to the gas station where the homicide took place; (4) failed to interview petitioner's supervisor at work, who would have substantiated petitioner's assertion that the $50 found on his person at the time of his arrest came from his paycheck, issued two days earlier; (5) failed to investigate "cash receipts at the D Gas Station on the date in question;" and (6) failed to inform petitioner of the existence of the videotaped interview during which petitioner made "profane remarks and gestures," which was played by the prosecution during its rebuttal case. (*Id.*, at 33-36.)

In support of these claims, petitioner has filed the declaration of his habeas investigator, who states that she had a telephone conversation with Joshua Powell, an employee of the Chevron gas station in Walnut Grove, California on the day of the killing. Mr. Powell told the habeas investigator that he had informed a previous investigator in 1995 that four Hispanic men came into his gas station on the day of

the killing and that he believed these four individuals were involved in the homicide in this case. (Am. Pet., Ex. D.) Petitioner has also filed his own declaration, in which he states that he informed his trial counsel of the existence of Mr. Powell, but that counsel made no effort to find him. (Am. Pet., Ex. Q.) Finally, petitioner has filed the declaration of Melody Owens, who was eleven years old at the time of the crime. (Am. Pet., Ex. E.) Ms. Owens declares that she saw a car containing four or five Hispanic males in Courtland, California on the day of the homicide and that the driver asked her for the location of a gas station. (*Id.*) Petitioner argues that if his trial counsel had conducted sufficient investigation to obtain the above-described evidence for presentation at trial, it would have corroborated his testimony that two other persons committed the crime.

ii. Failure to Perform Competently at Trial

Petitioner contends that his counsel rendered ineffective assistance at trial when he: (1) failed to subpoena witness Lee Smith, thereby assuring that his request for a continuance of the trial to obtain this witness would be denied; (2) failed to "appropriately challenge" inconsistencies in the testimony of the Annis brothers; (3) failed to present evidence with respect to the suspect nature of cross-cultural eyewitness identifications; (4) failed to object when the trial court cut off his questioning of Allen Annis; and (5) failed to introduce evidence with respect to

petitioner's intoxication on the night of the crime. (P&A at 36-38.) Petitioner contends that "had [counsel] delivered Lee Smith's testimony by having him under subpoena, and had [counsel] adequately challenged the Annis brothers' identification of Galvan, it is quite likely that the jury would not have convicted [petitioner] of murder." (*Id.* at 45.)

iii. Failure to Perform Competently "Post-Verdict"

Petitioner argues that his trial counsel rendered ineffective assistance after the verdict but before sentencing when he: (1) failed to visit petitioner; and (2) failed to turn over his trial file. (*Id.* at 38.)

iv. State Court Opinion

As described above, in May of 1999, petitioner filed a petition for writ of habeas corpus in the Sacramento County Superior Court. (Am. Answer, Ex. F.) Therein, he set forth a factual basis for each of the ineffective assistance of counsel arguments raised in this claim except with respect to his pattern-and-practice argument. (*Id.*) The Superior Court denied the petition in a reasoned opinion which concluded that most of petitioner's claims were barred on procedural grounds and that petitioner had failed to make a prima facie showing in support of any claim. (Am. Answer, Ex. G.) Accordingly, that opinion provides the basis for the state court judgment with respect to petitioner's *Strickland* claim, with the exception of

his pattern-and-practice allegation. *Avila v. Galata,* 297 F.3d 911, 918 (9th Cir. 2002). The Superior Court rejected petitioner's arguments in this regard on the merits, stating:

> In any event, even without the procedural bars, petitioner does not state a prima facie case on any of his ineffective assistance of counsel allegations. To prevail on an ineffective assistance of counsel claim, a petitioner must show not only that his counsel's performance was deficient, but that absent the deficiency it is reasonably probable that the result would have been different (*Strickland v. Washington* (1984) 466 U.S. 668). He does not meet this standard.
>
> Petitioner first alleges that trial counsel had extremely limited contact with petitioner, visiting him only five times from time of arrest until commencement of the jury trial. Petitioner claims that as a result, trial counsel did not develop an adequate understanding of many pertinent aspects of the case.
>
> He claims that neither his trial counsel nor his investigator tracked down "a potentially critical" witness who, "just moments before the homicide," saw petitioner and Acuna with the "two actual perpetrators" of the homicide. This witness allegedly worked as a clerk at a gas station in Walnut Grove, and [saw] that petitioner, Acuna, and "the two perpetrators" were at the gas station "just minutes" before the homicide. The clerk "would have remembered" that all four of

them were intoxicated. If this had been established, petitioner claims that the prosecutor would not have been able to argue that that [sic] petitioner's story on the stand was not believable. In support, petitioner attaches his own declaration, stating that he advised his counsel and the investigator that "just five to ten minutes" before "the four of us" arrived at the crime scene, they had stopped at a gas station in Walnut Grove, and that a male clerk at the gas station assisted them. Petitioner claims in his declaration, "I know we made an impression on him and that he would recall that there were four of us." Petitioner, however, does not submit any declaration by the gas station attendant himself. His speculation that the attendant would have recalled the four of them is not proper documentation of this claim (*Harris, supra*).

In any event, even if petitioner could now find the gas station attendant and obtain a proper declaration from him, and even if that had been before the jury at trial, it would not have made any difference in the verdict. Christopher Annis gave credible testimony at trial that he saw three persons run out of the market, one of whom he positively identified both in a photo lineup and at trial itself as being petitioner. He also testified during cross-examination that he could not see in the back seat of the car, leaving open the possibility that there was a fourth person in the back seat. Thus, even if petitioner were now to be believed, that a gas station attendant saw petitioner, Acuna, and two others

in the car just minutes before the murder, it would not be inconsistent with Annis's testimony that three persons, including petitioner, came out of the market after the shooting, carrying guns. Rather, it is still possible, under Annis's testimony, that a fourth person was in the back seat of the car. It is also still possible that at some point between the gas station and the market, a fourth person got out of the car. The gas station attendant, therefore, would have added nothing to change the outcome of the trial. The jury still would have believed Annis's testimony that three persons, including petitioner, came out of the market.

Petitioner also alleges that he told his trial counsel and the investigator that the $50 he had on him at the time of his arrest 45 minutes after the crime came from a paycheck he had received just two days previously from his work at America Live. Petitioner claims that this could have been verified by his supervisor, Norma Jean O'Connell. However, petitioner attaches no declaration by O'Connell attesting to this (*Harris, supra*). In any event, again there is no showing of prejudice. Even if this had been presented to the jury, the jurors could reasonably have believed that petitioner no longer had the $50 from his job, two days having passed since he had allegedly been paid, and instead believed that petitioner and Acuna had taken $100 from the market and had split the proceeds, he getting $50 and Acuna getting $50. Even if the jury was not sure about the source of

petitioner's $50, petitioner's claim does not explain the $50 found on Acuna, or Christopher Annis's credible testimony that he saw petitioner and two others run out of the market with guns immediately after the clerk inside had been shot. Therefore, even if petitioner had presented credible documentation of his claim regarding the $50, presentation of that evidence at trial would not have made a difference in the outcome of the trial.

Petitioner next alleges that after petitioner testified at trial, the prosecution, in rebuttal, played for the jury a videotape of petitioner in custody at the sheriff's department shortly after arrest, and that petitioner had not been told by his trial counsel before he testified that such a videotape even existed. Petitioner claims that the videotape showed petitioner intoxicated and making profane remarks and gestures, and petitioner making statements inconsistent with his trial testimony. Petitioner claims that his counsel should have gone over the videotape with petitioner before he testified. Petitioner, however, does not set forth how his testimony would have been different, had he seen the videotape before he testified, and whether his story on the witness stand would have changed, let alone whether he would have testified any differently so as to refute Christopher Annis's testimony. Nor does he claim that he would not have decided to testify had he seen the videotape beforehand. Therefore, petitioner fails to show how the outcome of

the trial would have been different, had he seen the videotape before he testified.

Petitioner next alleges that his trial counsel was ineffective in failing to subpoena Officer Smith to testify. As noted in the Third District Court of Appeal opinion affirming the judgment in this case, however, even if it were error for the trial court to have denied a continuance so that Officer Smith could have testified, it would have made no difference in the outcome of the trial. Christopher Annis testified that three persons, including petitioner, came running out of the market with guns, which is not inconsistent with petitioner's testimony that there were four of them, including the two unnamed persons, as the fourth person could have been in the back seat of the car and just not seen by Annis. Further, both petitioner and Esquivel had already testified about the consequences of a gang member "snitching" on another, and at most Smith's testimony would have been cumulative.

Petitioner next claims that trial counsel was ineffective for failing to present the jury with expert testimony concerning the fallibility of cross-ethnic eyewitness identification under rapid and exciting circumstances. Petitioner, however, presents no declaration from an expert on cross-racial identification, on what would have been presented to the jury had it been offered (*Harris, supra*). Nor is there any showing that had this been offered into evidence, it would have been an abuse of

discretion for the trial court not to have allowed it. It is error to exclude cross-racial identification expert testimony only if the eyewitness identification of the defendant is a key element of the prosecution's case, the eyewitness identification is not substantially corroborated by evidence giving it independent reliability, and the defendant offers expert testimony on specific psychological factors shown by the record that could affect the accuracy of the identification but are not likely to be fully known to or understood by the jury. (*People v. McDonald* (1984) 37 Cal.3d 351, 377; *see also People v. Sanders* (1995) 11 Cal.4th 475). In this ease, the eyewitness identification by Christopher Annis was key, but there was other evidence substantially connecting petitioner to the murder; petitioner admitted he was there at the scene; petitioner was caught in the car bearing the license plate number that Annis had seen, within 45 minutes of the murder; at the time petitioner was caught, he had a gun with him that had fired shots in the market. Nor does petitioner show any specific psychological factors that could have affected the accuracy of the identification.

Petitioner next alleges that trial counsel failed to cross-examine the Annis brothers. He claims only that when cross-examining Allen Annis, the trial court abruptly stated that it wanted to finish with the witness that evening and that co-counsel was to be given the opportunity to cross-examine, and that trial counsel acquiesced. Petitioner makes no

showing of what trial counsel failed to ask during the cross-examination that he did conduct, and what further cross-examination would have borne fruit . . . [or] would have changed the outcome of the trial.

Petitioner next alleges that trial counsel failed to adduce evidence of petitioner's intoxication level at the time of the crime. Petitioner claims that "among other things, such evidence would have enabled [petitioner] to provide a relatively ameliorative explanation concerning his inappropriate conduct on the video tape." Petitioner does not claim, however, that such evidence would have affected the jury's determination of whether he was intoxicated at the time he committed the crimes, and if so, whether the intoxication was to such an extent that petitioner did not actually form the intent to commit the crimes. Nor does petitioner make any showing, with documentary evidence or affidavits, as to what his intoxication level actually was at the time of the crime. (*Harris, supra*).

Petitioner's final allegation of ineffective assistance of counsel is that trial counsel failed to provide petitioner with effective assistance in postverdict proceedings, because trial counsel did not visit petitioner after the verdicts, and to date, despite repeated requests from petitioner's current counsel, has not turned over his trial file. Petitioner, however, points to nothing specific in the postverdict proceedings that evidences a deficiency in

> performance at the postverdict stage (*Swain, supra; Harris, supra*).
>
> Not having stated a prima facie case under *Strickland, supra,* petitioner's claim of ineffective assistance of counsel fails, regardless of whether any part of this claim is barred under *Waltreus, supra,* or *Clark, supra.*

(Am. Answer, Ex. G at 4-9.)

The conclusion of the California Superior Court that petitioner failed to demonstrate prejudice with respect to his claim that his trial counsel rendered ineffective assistance is not objectively unreasonable and should not be set aside. Even assuming arguendo that counsel's failure to perform the actions suggested by petitioner was outside the wide range of professional assistance, petitioner has failed to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland,* 466 U.S. at 69[4].

As noted above, the evidence against petitioner was overwhelming. Two eyewitnesses described petitioner as one of the persons who ran out of the market immediately after the shooting, carrying a gun. Petitioner admitted he was at the scene of the crime. A short time later, petitioner and his co-defendant were apprehended in the getaway car with both of the murder weapons and $50 each in cash. Petitioner had shown one of the murder weapons to a friend earlier in the day. Further, there was substantial evidence presented at trial that more than two

persons were involved in the crime and petitioner's counsel highlighted this fact in his closing argument. (RT at 666-67.) The prosecutor did not dispute that there might have been one or two people with petitioner and his co-defendant at the time of the robbery and murder. (*Id.* at 635, 645-46.) Under these circumstances, as explained in detail by the California Superior Court, trial counsel's failure to conduct the investigation now suggested by petitioner could not have affected the outcome of the trial. The decision of the California courts to the same effect is not contrary to or an unreasonable application of federal law as set out in the *Strickland* decision. Accordingly, petitioner is not entitled to relief on this claim.

c. Counsel's Pattern and Practice of Ineffective Assistance

As noted, petitioner also argues that his trial counsel had a "pattern and practice" of providing ineffective representation to his clients in criminal cases. In support of this claim, petitioner has filed documents pertaining to several cases in which his trial counsel represented other criminal defendants, including one case in which a defendant's attempted murder conviction was set aside based on a finding that petitioner's counsel rendered prejudicial ineffective assistance. (Am. Pet. at 9-11; P&A at 39-45 & Exs. W, X, Y, Z, AA.) (*Id.* at 41.) Specifically, on November 30, 2001, the attempted murder conviction of one of trial counsel's clients was set aside based in large part on counsel's complete failure to prepare his

client for her direct examination. (Am. Pet., Ex. W.) In another case petitioner's trial counsel was criticized by the trial judge for failing to prepare one of his clients to testify on direct examination. (P&A at 42-43; Am. Pet., Exs. X, Y.) In yet another case petitioner's trial counsel failed to timely disclose critical defense evidence to the prosecution, resulting in the trial judge being compelled to give a jury instruction regarding counsel's discovery violation. (P&A at 43-44; Am. Pet., Ex. Z.) Petitioner also includes in support of this claim the declaration of the Director of the Sacramento County Indigent Defense Program, who declares that petitioner's trial counsel is no longer receiving panel appointments in homicide cases. (P&A at 45; Am. Pet, Ex AA.)[11] Finally, petitioner's current counsel represents that he has spoken with several attorneys who are raising "multifacted ineffectiveness challenges" in federal habeas corpus petitions challenging the representation provided by petitioner's trial counsel to their clients in state court. Petitioner argues that "the fact that [trial counsel] has repeatedly acted with incompetence is

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[11] Respondent argues that the exhibits attached to the amended petition in support of petitioner's "pattern and practice" argument constitute inadmissible character, disposition, or propensity evidence and requests that the exhibits be stricken. (Am. Answer at 11-16.) Respondent's challenges to these exhibits have previously been rejected by this court. (May 1, 2002 Findings and Recommendations at 2 n.1.) For the reasons set forth in the May 1, 2002 findings and recommendations, respondent's challenges to the admissibility of Exhibits W, X, Y, Z, and AA are again rejected.

probative with regard to the issue of whether he acted with competence in this particular case." (P&A at 46)

Petitioner's claim of ineffective assistance of counsel based on counsel's pattern-and-practice of substandard performance was raised for the first time in a petition for writ of habeas corpus filed in the Sacramento Superior Court on February 25, 2002. (Pet'r's Application for Order Staying Federal Habeas Proceedings lodged Feb. 25, 2002, Ex. A at 2-4.) The petition was denied on the merits in a reasoned decision dated March 14, 2002, (Decision of the Sacramento Superior Court, lodged December 8, 2005 (Superior Court decision).) A habeas petition raising this claim was filed in the California Court of Appeal and was summarily denied on April 11, 2002. (Decision of the California Court of Appeal, lodged November 4, 2005.) The California Supreme Court summarily denied review on July 10, 2002. (*Id.*; Pet'r's Status Report filed July 11, 2002, & Ex. A.) Accordingly, petitioner's pattern-and-practice claim will be reviewed pursuant to the standards set forth in the AEDPA.

In state court, petitioner argued that his trial counsel had engaged in a pattern-and-practice of providing ineffective assistance to his clients and that, in accordance with that pattern and practice, he rendered ineffective assistance to petitioner. (Superior Court decision at 2-3.) Petitioner also argued that "because he is establishing a pattern and practice of ineffectiveness by attorney Holmes in the current

petition, he does not need to show prejudice." (*Id.* at 3.) The Superior Court concluded, after a thorough review of the cases cited by petitioner in support of this latter contention, that the prejudice prong of *Strickland* was not eliminated simply because petitioner was alleging his trial counsel had a pattern-and-practice of providing ineffective assistance. (*Id.* at 3-12.) Relying on its earlier decision denying petitioner's first habeas petition filed in that court, the Superior Court concluded that petitioner failed to show prejudice because "nothing . . . refuted in any way the eyewitness testimony at trial that [petitioner] came running out of the market with a gun immediately after the shots were fired inside." (*Id.* at 2.) The Superior Court also found that petitioner failed to establish that his trial attorney had engaged in a pattern and practice of rendering ineffective assistance of counsel. The court reasoned as follows:

> All petitioner realistically shows is one single other instance of ineffective assistance of counsel, occurring years after petitioner's own trial. Specifically, petitioner attaches in support of his second habeas petition a transcript of the new trial motion hearing in *People v. Lisa Castelone,* Case No. CR 76351, held on November 30, 2001, years after petitioner's own conviction, showing that Judge McMaster found Mr. Holmes to have rendered ineffective assistance of counsel to defendant Castelone in a recent trial. Petitioner also attaches a declaration under seal, from Fern Laethem, the director of this county's Indigent Defense Program, that

> after Judge McMaster granted the new trial in *Castelone,* Mr. Holmes was investigated and removed from the Indigent Defense Program's list of appointments for homicide cases, and notably not for all cases.
>
> Webster's New World Dictionary, Second College Edition (1968) provides for a definition of "pattern" in the context of a behavior pattern, as "a regular, mainly unvarying way of acting or doing." Webster's Third New International Dictionary (1986) provides for a definition of "practice" as being "to do or perform often, customarily, or habitually" or to "engage regularly in."
>
> A single instance of ineffective assistance of counsel, in another case tried years after this petitioner's case was tried, simply does not, by itself, establish either a "pattern" or a "practice" or rendering ineffective assistance of counsel to clients at the time of petitioner's own trial. Thus, even if the prejudice prong were not required to be shown, petitioner's claim fails.

(*Id.* at 12.) (underlining in original.)

In this court, petitioner argues that "the establishment of a pattern and practice of incompetence can dispense with or significantly reduce the need to demonstrate particularized prejudice" and that "at a minimum [pattern and practice] evidence is highly relevant in assessing a specific ineffectiveness claim." (P&A at 39.) In *Sanders v. Ratelle*, 21 F.3d 1446, 1460 (9th Cir. 1994), the petitioner produced evidence that

his trial counsel was disbarred due to a 10-year pattern of misconduct.[12] The petitioner in that case also claimed that his counsel's poor past performance was relevant to his claim that his counsel rendered ineffective assistance when he refused to interview a witness who had confessed to the crime of which his client was ultimately convicted. The Ninth Circuit Court of Appeals considered counsel's past pattern of ineffectiveness in concluding that he had provided ineffective assistance in the case before it, but also required the petitioner to demonstrate prejudice. 21 F.3d at 1460-61. The essence of the holding in *Sanders* was that a finding of prior ineffective assistance may in some instances be relevant [to] consideration of similar allegations in a later case, but that each case must be decided on its own merits and the petitioner must demonstrate that prejudice resulted in his own case. *Id.*; *Williams v. Woodford,* 396 F.3d 1059, 1063 (9th Cir. 2005) (evidence that prosecutor had a

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[12] Specifically, the trial counsel in question had been "disbarred from the practice of law . . . [for] a course of conduct demonstrating a complete indifference to his legal and ethical duties, to the great detriment of his clients." *Sanders v. Ratelle,* 21 F.3d 1446, 1460 (9th Cir. 1994). The California State Bar Court findings of a "course of conduct" were based on specific instances of "complete indifference" and "great detriment" to clients occurring over a period from 1979 through 1987. *Id.* "In most of these instances, (counsel) was retained by clients and then did nothing to investigate or further their cases." *Id.* Suffice it to say, counsel's conduct described in the *Sanders* decision was far more egregious than the conduct of petitioner's trial counsel in this case.

"pattern-or-practice" of discriminating on the basis of [r]ace in the exercise of peremptory challenges was relevant to "buttress" petitioner's *Batson* claim); *In re Vargas,* 83 Cal. App. 4th 1125, 1134-36 (2000) (a finding of prior ineffective assistance may be relevant to the credibility of the attorney's stated reason for failures to act in a particular case); *see also Young v. Runnels,* 435 F.3d 1038, 1043 (9th Cir. 2006) (holding that prejudice is not to be presumed even where the trial lawyer was subject to disciplinary proceedings while representing a client and was subsequently disbarred because such circumstances do "not mean that he is presumptively incapable of providing effective assistance"); *United States v. Mouzin,* 785 F.2d 682, 696-98 (9th Cir. 1986) (same).

In this case, as found by the state trial and appellate courts and for the reasons set forth above, petitioner has failed to show that he suffered prejudice as a result of his trial counsel's performance. Further, the undersigned is persuaded by the California Superior Court's observation that the one prior instance of petitioner's trial counsel being found to have provided ineffective assistance of counsel does not establish a "pattern and practice" of providing ineffective assistance. This conclusion is not altered by the fact that counsel was reprimanded by a trial judge on two other occasions or that, for reasons unknown, petitioner's trial counsel is no longer being assigned homicide cases by the local Indigent Defense Program. *See Young,* 435 F.3d at 1043 ("[I]f the discipline rendered is indicative of counsel's substandard abilities, then that deficiency should be manifested in

counsel's courtroom behavior and trial conduct.") For these reasons, petitioner is not entitled to relief on this claim.

3. Appellate Counsel

Petitioner claims that his appellate counsel rendered ineffective assistance in failing to present a claim that the trial court erred by refusing to instruct the jury that "his vicarious accountability for murder was dependent on a finding that the death was reasonably foreseeable to petitioner." (P&A at 57.) As explained above, there is no merit to petitioner's claim that his trial was rendered fundamentally unfair by the trial court['s] failure to give a jury instruction on "reasonable foreseeability." For this reason, petitioner's assertion that his appellate counsel was ineffective for failing to raise such a claim also must fail.

E. Cumulative Effect of All Errors

Petitioner's final claim is that the cumulative effect of all of the errors alleged in connection with his trial requires that granting of relief. (P&A at 4.) This argument was rejected by the California Court of Appeal on petitioner's direct appeal and by the California Supreme Court in the first state habeas petition, both without comment. (*See* Ex. D, I, J to Am. Answer.)

Where the cumulative effect of errors is so prejudicial that defendant is denied a fair trial, habeas

relief may be warranted. *See United States v. Necoechea,* 986 F.2d 1273, 1282-83 (9th Cir. 1993). For the reasons set forth above with respect to each of the claims, petitioner has not established that he was denied due process by the cumulative effect of the claims asserted here. Accordingly, petitioner is not entitled to relief on this claim.

For the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst,* 951 F.2d 1153 (9th Cir. 1991).

DATED: March 15, 2006.

/s/ Dale A. Drozd
DALE A. DROZD
UNITED STATES
MAGISTRATE JUDGE

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

- - - -

THE PEOPLE, Plaintiff and Respondent, v. IVAN GALVAN, Defendant and Appellant.	C024961 (Super. Ct. No. 95F01592) (Filed Feb. 24, 1998)

A jury convicted defendant of first degree murder (Pen. Code, § 187, subd. (a); undesignated-section references are to this code) and robbery (§ 211). In connection with both counts, the jury found that defendant used a firearm within the meaning of section 12022.5, subdivision (a). The jury also found that the murder was committed in commission of the robbery (§ 190.2, subd. (a)(17)).[1]

The court sentenced defendant to state prison for life without the possibility of parole for the murder

[1] Codefendant Gonzalo Acuna was tried and convicted of the same counts and allegations; he did not jointly appeal with defendant.

plus a consecutive 10-year term for firearm use. The court stayed punishment for the robbery pursuant to section 654.

On appeal, defendant contends (1) his constitutional rights to present a defense, due process and effective assistance of counsel were violated in that the trial court erroneously denied his request for a continuance and thereafter denied his request to reopen his case to present the testimony of a gang expert, (2) the trial court erroneously denied his request for a pinpoint instruction on third party culpability and (3) the trial court erroneously refused to give defendant's instruction on voluntary intoxication (CALJIC No. 4.21). We will affirm.

FACTS

At about 3:45 p.m. on February 17, 1995, defendant and two other Hispanic men robbed the Courtland Market and shot and killed the clerk, Bora Vong Phan Vong Sa. Defendant and his accomplices ran out of the market, got into a Ford Thunderbird and sped off, Christopher Annis, who had just driven up to the D Gas Station next door to the market, witnessed the men running out of the market with guns. He yelled out "guns" and the license number of the Thunderbird. Christopher's brother, Allen Annis, wrote the number down. Allen also saw three Hispanic men. The Thunderbird was registered to Gonzalo Acuna's mother-in-law, Carmen Trillo. The police set up surveillance of Trillo's residence in Sacramento.

Shortly thereafter, at about 4.30 p.m., defendant and Acuna arrived in the Thunderbird. Acuna was driving. Two semi-automatic weapons, a Cobray and a Lorcin, were recovered. The Cobray was found next to the driver's door on the ground. The Lorcin was found under the car on the passenger side. Defendant and Acuna each had about $50.

Phan Vong Sa died from a gunshot wound to the back of the head. He also suffered a gunshot wound that went through his chest and arm. A bullet removed from Phan Vong Sa and a spent cartridge case found at the market came from the Cobray. A spent projectile found at the market was consistent with having been fired by the Lorcin.

Anthony Esquivel saw Acuna and defendant in Trillo's car the morning of the robbery and murder. Defendant showed him the Lorcin. Esquivel testified that defendant and Acuna were members of the Nortenos gang.

At trial, Christopher Annis positively identified defendant as one of the men who ran out of the market. Allen Annis thought defendant looked familiar. Allen and Christopher Annis identified defendant from a photo lineup.

Defendant testified. One or two nights before the robbery/murder, defendant purchased the Lorcin using $80 from his paycheck. The next morning, defendant showed the gun to Esquivel. Defendant and Esquivel met Acuna at a park. Acuna was driving the Thunderbird. They drove to Elmo's liquor store

where defendant bought a 12-pack of beer. They went to Temple park where they met two Hispanic men with whom they shared their beer. The two men were wearing dark clothing. One had on a black windbreaker and a black wool knit cap. Although defendant knew the names of the two men, he refused to reveal them because he feared retribution from their gang. Upon finishing the beer, defendant bought another 12-pack at Elmo's. Defendant, Acuna and the two men went to the river where they all took turns shooting defendant's and Acuna's guns. The guns were then placed under the front seat. When they stopped for more beer, Acuna and defendant stayed in the car while the two men went into the Courtland Market. Defendant did not notice if they took the guns. He heard no gunshots but the radio was very loud. The two men returned to the car and acted crazy. One of the men put something under the front seat. They had not bought any beer. Acuna drove back to Elmo's where they dropped off the two men. Defendant did not "feel like going to work" because he felt "a little buzzed." Acuna and defendant then drove to Trillo's house where they were arrested.

Defendant did not know if the two Hispanic men "killed the guy or not."

DISCUSSION

I

When the prosecutor asked defendant on cross-examination for the names of the two men, defendant

refused to reveal them because he was afraid of retribution from their gang. The court admonished defendant that if he persisted in his refusal to name them, his entire testimony would be stricken. Out of the jury's presence, defense counsel objected to the court's intended ruling to strike defendant's testimony and to admonish the jury. He explained he had an expert, Sacramento County Deputy Sheriff Lee Smith, currently a courtroom bailiff, who had previously worked in a gang unit. Smith knew defendant and would explain the consequences of informing upon a fellow Norteno/Soreno [sic]. The court reconsidered upon the prosecutor's request, let the testimony stand[,] but instructed the jury that defendant's failure to reveal the names of the two men was "a credibility matter or circumstance" to consider "in weighing the testimony of this witness." The prosecution thereafter finished its cross-examination of defendant. The court recessed that Friday afternoon until Monday morning. The court stated to the parties that it wanted the prosecutor to have his rebuttal witnesses available for Monday as well as arguments Monday. Defense counsel was asked and responded that he had no additional witness "[a]s of right now" and Acuna's attorney had none.

On Monday morning, the prosecution recalled Esquivel who had previously testified that defendant was a Norteno gang member to explain whether he had seen defendant's backpack from which he had removed the gun. On cross-examination, Esquivel was then allowed over the prosecution's objection to

testify that if a Norteno discloses the name of another Norteno in connection with a serious felony offense, the informer could be killed.

Outside the presence of the jury, the prosecutor complained that the defense was allowed to question Esquivel about gang retaliation when the prosecution thought the court had resolved to allow gang expert testimony if Smith qualified and defense counsel would make an offer of proof. Defense counsel explained that due to the court's admonishment, Smith's testimony would go to defendant's credibility.

The court planned to hold an Evidence Code section 402 hearing to determine whether Smith qualified as an expert. Smith was ill that afternoon and unavailable to testify until the next morning (Tuesday). Defense counsel made an offer of proof. Smith, a former member of the Sacramento Gang Suppression Unit, would testify that if a Norteno gang member testified against another Norteno gang member, he and his family would suffer punishment, possibly death. Smith recognized defendant's street name and knew who he was. Defense counsel requested a continuance for the section 402 hearing until the next morning. The court initially denied the request for a continuance stating that the parties had already agreed to argue the case that afternoon, that Smith may or may not qualify as an expert, and that defendant had already testified he would suffer dire consequences if he revealed the names of the two men.

The prosecutor argued that defendant had failed to set forth a factual foundation showing relevance for a section 402 hearing. Defense counsel then asked for a ruling treating the offer of proof as the section 402 hearing. After an off-the-record discussion, the prosecutor stated that Smith had only qualified as an expert on a prison gang but had "never been qualified as an expert in the area of Nortenos and Servanos [sic]." Defense counsel confirmed that Smith had "never qualified before." Defense counsel then represented that someone else, Ron Montez, would be available to testify as an expert that morning at 11:30 a.m.

After the prosecutor's criminalist testified, the prosecution rested. Defense counsel informed the court he had no evidence but wanted "to reserve our previous discussion about the 402 hearing for tomorrow morning." After an off-the-record conversation, defense counsel stated he had no witness available for 11:30 a.m. The court stated, "Subject to your 402 request, no other evidence?" Defense counsel responded, "No other evidence." Defense counsel agreed that he rested. Later, for the record, defense counsel noted that Montez had canceled and the section 402 hearing was with Smith. The court noted defense counsel's offer of proof showed that Smith had not qualified as an expert and was unavailable that date.

After the prosecutor made his opening argument and defense counsel made his closing argument, the court recessed for the evening.

The next morning prior to closing argument by Acuna's attorney, defense counsel, who appeared with Smith, renewed his request for a section 402 hearing and requested to reopen for Smith's testimony. Defense counsel stated that Smith had previously qualified as a gang expert and had agreed to testify without being subpoenaed. The court denied defense counsel's request.

Defendant contends the trial court erred in denying his request for a continuance and to reopen his case to present the testimony of the gang expert. Defendant argues the court's denial of the continuance request violated his right to due process, effective assistance of counsel and the right to present a defense. Defense counsel claims the trial court "clearly misunderstood the relevance of the proffered evidence, stating in the jury's presence that Esquivel's testimony regarding any danger to (defendant) was speculative." Esquivel's response was "I assume they could be" in answer to whether a snitch's family could be in jeopardy. "The court reiterated its belief in discussions with counsel outside the presence of the jury. . . . Due to this error, the court refused to allow [defendant] to make a record of Smith's proffered testimony in a 402 hearing when Smith was present and willing to testify." Further, defendant notes that when the prosecutor had witnesses who were unavailable, the court required defense counsel to proceed with his. In the middle of the defense case, the prosecutor was allowed to reopen to present those witnesses who had been unavailable. Defendant

argues the court's refusal to make a reasonable accommodation when Smith was unavailable contributed to an appearance of partiality.

"The granting or denial of a continuance during trial traditionally rests within the sound discretion of the trial judge. [Citations.] To establish good cause for a continuance, defendant had the burden of showing that he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven. [Citations.]" (*People v. Howard* (1992) 1 Cal.4th 1132, 1171; *People v. Courts* (1985) 37 Cal.3d 784, 790; *People v. Duck Wong* (1976) 18 Cal.3d 178, 188-189; *People v. Strozier* (1993) 20 Cal.App.4th 55, 60; *People v. Sandoval* (1977) 70 Cal.App.3d 73, 82.)

With respect to the trial court's denial of defendant's request to reopen his case, defendant must demonstrate that the trial court abused its discretion. The following factors are considered: "(1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1520, citing *People v. Goss* (1992) 7 Cal.App.4th 702, 706 and *People v. Newton* (1970) 8 Cal.App.3d 359, 383; see also §§ 1093, 1094.)

Even assuming the trial court erred in denying a continuance and defendant's request to reopen, the error was harmless beyond a reasonable doubt. The jury heard Esquivel's uncontradicted testimony that a Norteno could be killed who pointed the finger at another member. Defendant was positively identified as one of the three men who ran out of the market with a gun. When he was arrested a short time after the crime, defendant had in his possession one of the weapons used in the crime. We see no possibility of a result more favorable to defendant had Smith been allowed to testify as to gang retaliation. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].)

II

Defendant requested an instruction on third party culpability.[2] Without explanation, the trial court

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[2] The proposed instruction read as follows: "You have heard evidence that other persons were involved in this charged crime. It is not required that the defendant prove this fact beyond a reasonable doubt. Defendant is entitled to an acquittal if the evidence raises a reasonable doubt in your minds as to the defendants' guilt. Such evidence may by itself raise a reasonable doubt as to the defendants' guilt. However, its weight and significance, if any, are matters for your determination. If after consideration of this and all of the other evidence, you have a reasonable doubt that the defendant(s) committed [t]his offense, you must give the defendant(s) the benefit of the doubt and find him/them not guilty."

refused to so instruct. Defendant contends he was entitled to the pinpoint instruction.

"'"[T]he trial court must instruct on the general principles of law relevant to the issues raised by the evidence,"'" that is, "'"those principles which are closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.]'" (*People v. Wickersham* (1982) 32 Cal.3d 307, 323, overruled on another point in *People v. Barton* (1995) 12 Cal.4th 186, 200; *People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) The defense has a right to a pinpoint instruction, that is, an instruction on a particular defense theory, provided that it appears the defendant is relying on the defense, or there is substantial evidence supporting such defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137; *People v. Sedeno, supra*, 10 Cal.3d at p. 716.)

The jury was instructed in the language of CALJIC No. 2.11.5: "There has been some evidence in this case indicating that a person other than the defendants was or may have been involved in the crime for which the defendants are here on trial. There may be many reasons why such person is not here on trial; therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he or she has been or will be prosecuted. Your duty is to decide whether

the People have proved the guilt of the defendants on trial." Although defendant asserts the instruction "essentially undermined the legal value of [his] theory of the case," he acknowledges that the instruction has been approved because it "does not tell the jury it cannot consider evidence that someone else *committed* the crime." (*People v. Farmer* (1989) 47 Cal.3d 888, 918-919, original italics.) Defendant's proposed instruction was repetitious of instructions already given (CALJIC No. 2.11.5; CALJIC No. 2.90 [reasonable doubt instruction]) and the trial court properly refused it. (*Wright*, *supra*, 45 Cal.3d at p. 1134.)

Assuming any error, it was harmless. (*People v. Adrian* (1982) 135 Cal.App.3d 335, 341-342.) The jury heard the evidence and the argument that an unnamed person or persons committed the crimes. The prosecution evidence established that three men ran out of the market. Even if the jury believed defendant that the two unnamed men committed the crimes, the jury could have found defendant was the third man who was seen running out of the market. Even if the jury believed defendant stayed in the car, he could still be convicted under an aiding and abetting theory for acting as a lookout.

III

Defendant finally contends that the trial court erroneously denied his requested instruction on voluntary intoxication as well as CALJIC No. 4.21 to

negate the specific intent required for robbery and an aiding and abetting theory.[3]

"The fact that a defendant has been drinking, without evidence that he became intoxicated thereby, provides no basis for an instruction on intoxication." (*People v. Sanchez* (1982) 131 Cal.App.3d 718, 735; see also *People v. Cain* (1995) 10 Cal.4th 1, 40; *People v. Williams* (1988) 45 Cal.3d 1268, 1311-1312; *People v. Carr* (1972) 8 Cal.3d 287, 294-295; *People v. Spencer* (1963) 60 Cal.2d 64, 87-89.)

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[3] Defendant requested a proposed instruction which provided: "You have heard evidence of intoxication of two individuals who were involved with the killing of the victim. You may consider this state of intoxication as to their ability to formulate the specific intent to rob said victim. You may further consider this state of intoxication as to any lesser degree of homicide in the event you fail to find a robbery has been committed beyond a reasonable doubt."

CALJIC No. 4.21 provides: "In the crime[s] of ___, [___,] [and ___,] of which the defendant is accused in Count[s] ___, [or that of ___, which [is a] [are] lesser crime[s] thereto,] [or in the allegation that ___] a necessary element is the existence in the mind of the defendant of the [specific intent to ___] [mental state[s] of ___.]

"If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required [specific intent] [mental state].

"If from all the evidence you have a reasonable doubt whether the defendant formed that [specific intent] [mental state[s]], you must find that [he] [she] did not have that [specific intent] [mental state[s]]."

Defendant testified that around noon, he and Acuna bought a 12-pack of beer which they shared with two other men. They purchased another 12-pack of beer which was consumed by the four men. Defendant decided he was "a little buzzed" from drinking and did not "feel like going to work." The robbery/murder occurred at about 3:45 p.m. Defendant was arrested at about 4:30 p.m.

"[W]hen there is no evidence from which a jury could conclude that as a result of voluntary intoxication the defendant failed to form the requisite criminal intent or attain the requisite mental state, instructions on the defense of voluntary intoxication may properly be refused. [Citations.]" (*Williams*, *supra*, 45 Cal.3d at p. 1311.) That situation obtains here. The trial court properly refused defendant's requested instructions.

Defendant's contention of cumulative error also fails.

DISPOSITION

The judgment is affirmed.

SIMS, J.

We concur:

BLEASE, Acting P.J.

SCOTLAND, J.

Third Appellate District No. C024961
S069240

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

IVAN GALVAN, Appellant

(Filed May 13, 1998)

Appellant's petition for review DENIED.

/s/ GEORGE
Chief Justice

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SACRAMENTO

DATE & TIME: June 9, 1999 **DEPT. NO.:** 13
JUDGE: JOHN V. STROUD **CLERK:** D. Walters
REPORTER: none **BAILIFF:** S. Perez

The People of the State of California

vs. 99F03892

Ivan Galvan

NATURE OF PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS – ***ORDER***

The petition for writ of habeas corpus has been filed and considered.

IT IS ORDERED that the petition for writ of habeas corpus is DENIED.

Petitioner collaterally attacks the judgment in Sacramento County Superior Court Case No. 95F01592 on several grounds.

As will be explained below in individual discussions of each of petitioner's claims, many of petitioner's claims are barred under applicable procedural grounds.

The first procedural bar is that of untimeliness, as this habeas petition was filed almost a year after the remittitur was issued. An untimely state habeas corpus petition is an abuse of the writ of habeas corpus, and if unjustified, is barred from habeas

corpus review unless (1) it alleges facts which, if proven, would establish that a fundamental miscarriage of justice occurred as a result of the proceedings leading to conviction, or (2) the petitioner is presenting newly discovered claims after demonstrating due diligence (*In re Clark* (1993) 5 Cal.4th 750, 774-775). Only the following represent a "fundamental miscarriage of justice" in this regard: (1) an error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner, (2) the petitioner is actually innocent of the crime or crimes of which the petitioner is convicted, (3) the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed the sentence of death, or (4) the petitioner was convicted or sentenced under an invalid statute (*In re Clark, supra,* 5 Cal.4th at pp. 787-798).

The second is the procedural bar for a habeas claim. that was raised and rejected on appeal (*In re Waltreus* (1965) 62. Cal.2d 218, *reaffirmed in In re Harris* (1993) 5 Cal.4th 813, 829). The only exceptions to this procedural bar are: (1) if the claim is based on constitutional error that is both clear and fundamental, and that strikes at the heart of the trial process; (2) if the claim is now couched in ineffective assistance of counsel terms; (3) if the court lacked fundamental jurisdiction over the petitioner or the subject matter; (4) if the court acted in excess of its

jurisdiction and the issue is strictly a legal one not requiring a redetermination of the facts underlying the claim; or (5) there has been a change in the law affecting the petitioner (*Harris, supra,* 5 Cal.4th 813, 834, 834 fn. 8. 836, 840-841, 841).

The third is the procedural bar for a habeas claim that could have been but was not raised on appeal (*In re Dixon* (1953) 41 Cal.2d 756, *reaffirmed in In re Harris* (1993) 5 Cal.4th 813, 829). The only exceptions to this procedural bar are: (1) if the claim is based on constitutional error that is both clear and fundamental, and that strikes at the heart of the trial process; (2) if the claim is now couched in ineffective assistance of counsel terms; (3) if the court lacked fundamental jurisdiction over the petitioner or the subject matter; (4) if the court acted in excess of its jurisdiction and the issue is strictly a legal one not requiring a redetermination of the facts underlying the claim; or (5) there has been a change in the law affecting the petitioner (*Harris, supra,* 5 Cal.4th 813, 834, 834 fn. 8, 836, 840-841, 841; *In re Antazo* (1970) 3 Cal.3d 100, 108 [exceptions to *Dixon* rule are same as those to *Waltreus* rule]).

As to petitioner's specific claims for relief from the judgment, petitioner's first claim is that the trial judge was not impartial, because in the presence of the jury he belittled petitioner's testimony and that of witness Esquivel; he cut off defendant's counsel's cross-examination of eyewitness Allen Annie; he refused a brief continuance to allow for Officer Smith to testify; and his mannerisms, expressions, and body

language during the testimony of petitioner and Esquivel, and during defendant's counsel's questioning of witnesses, betrayed the judge's lack of belief in and patience for petitioner's defense.

Petitioner attaches no part of the record-showing that the trial judge belittled petitioner's testimony or that of Esquivel in front of the jury or that he cut off the cross-examination of Allen Annis. As such, he has failed to state with particularity the facts upon which he is relying to justify relief (*In re Swain* (1949) 34 Cal.2d 300), supported by documentary evidence or affidavits (*In re Harris* (1993) 5 Cal.4th 813, 827 fn. 5).

As for the allegation of refusal of the trial judge to allow a continuance so that Officer Smith could testify, petitioner attaches no transcript of the refusal that specifically shows that in exercising his discretion to disallow the continuance, the trial judge showed any partiality. Again, this part of the claim fails under *Swain, supra,* and *Harris, supra.*

In support of the allegation that the trial judge used mannerisms, expressions, and body language during petitioner's testimony and that of Esquivel to show a lack of belief in and patience for either of them, petitioner attaches a declaration of Victor S. Haltom, petitioner's current attorney on habeas corpus, a person who was not even present at the trial. In that declaration, Haltom claims that petitioner has informed him that during his trial testimony and during the testimony of Esquivel, the trial

judge often had exasperated expressions on his face that often reddened in apparent anger and frustration, and that the trial judge's body language indicated that he was uncomfortable with and/or did not believe the trial testimony of either. Curiously, however, petitioner's own declaration, also attached to this petition, does not set forth any such statement, even though petitioner could have easily included it in his own declaration. For this reason, this part of petitioner's claim has no properly documented support. Nor does petitioner point to any part of the record in which he or his trial counsel objected to the trial judge making any sort of expression or body language, which would be some evidence that this had occurred at all. Therefore, this part of the claim fails under *Harris, supra.*

Because no part of petitioner's first claim properly sets forth the facts upon which petitioner is relying to justify relief supported by proper documentary evidence or affidavits, the claim is denied under *Swain* and *Harris.* As such, there is no need to determine whether this claim is barred under *Clark* and/or *Dixon.*

Petitioner's second claim is that the trial was fundamentally unfair because he was not allowed to present the testimony of Officer Smith on the danger to gang members and their families if the gang member "snitches" on fellow gang members. This claim was raised and rejected on appeal, and thus is barred under *Waltreus, supra.* None of the exceptions to the *Waltreus* bar are applicable to this claim. The claim is

also barred under *Clark, supra,* for being untimely. None of the exceptions to the *Clark* bar are applicable to this claim.

Petitioner urges that he is showing "new information" in the habeas petition, to render unviable the Third District Court of Appeal's opinion that any error in disallowing Smith's testimony was harmless. Petitioner claims that Smith's declaration, attached to the petition, shows substantial and impartial support for the defense theory that petitioner could not identify the perpetrators.

Petitioner is mistaken. Smith's declaration is only cumulative to what petitioner himself and witness Esquivel testified to at trial, that a gang member would endanger his life if he named another gang member as the perpetrator. The declaration does not reveal any constitutional error that strikes at the heart of the trial process, as is needed to get beyond the *Waltreus* bar. Nor does it show an error of constitutional magnitude that led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner, or that petitioner is actually innocent of the crime or crimes of which the petitioner is convicted, as is needed to get beyond the *Clark* bar. Eyewitness Christopher Annis testified that he saw petitioner run out of the market with a gun in his hand, and Smith's declaration contains nothing to refute that testimony. The claim is barred under both *Waltreus* and *Clark*.

Petitioner's third claim is that petitioner's trial counsel was ineffective. Much of this claim is based on facts outside the record, such that the claim is not barred by *Waltreus, supra.* However, the claim is barred under *Clark* unless petitioner can show that absent the ineffective assistance of counsel, no reasonable judge or jury would have convicted him, or that he is [in] fact actually innocent. He cannot meet either of these standards, because he shows nothing that refutes in any way the eyewitness testimony at trial that he came running out of the market with a gun immediately after the shots were fired inside.

In any event, even without the procedural bars, petitioner does not state a prima facie case on any of his ineffective assistance of counsel allegations. To prevail on an ineffective assistance of counsel claim, a petitioner must show not only that his counsel's performance was deficient, but that absent the deficiency it is reasonably probable that the result would have been different (*Strickland v. Washington* (1984) 466 U.S. 668). He does not meet this standard.

Petitioner first alleges that trial counsel had extremely limited contact with petitioner, visitng [sic] him only five times from the time of arrest until commencement of the jury trial. Petitioner claims that as a result, trial counsel did not develop an adequate understanding of many pertinent aspects of the case.

He claims that neither his trial counsel nor his investigator tracked down a "potentially critical"

witness who, "just moments before the homicide," saw petitioner and Acuna with the "two actual perpetrators" of the homicide. This witness allegedly worked as a clerk at a gas station in Walnut Grove, and [saw] that petitioner, Acuna, and "the two perpetrators" were at the gas station "just minutes" before the homicide. The clerk "would have remembered" that all four of them were intoxicated. If this had been established, petitioner claims that the prosecutor would not have been able to argue that that [sic] petitioner's story on the stand was not believable. In support, petitioner attaches his own declaration, stating that he advised his counsel and the investigator that "just five to ten minutes" before "the four of us" arrived at the crime scene, they had stopped at a gas station in Walnut Grove, and that a male clerk at the gas station assisted them. Petitioner claims in his declaration, "I know we made an impression on him and that he would recall that there were four of us." Petitioner, however, does not submit any declaration by the gas station attendant himself. His speculation that the attendant would have recalled the four of them is not proper documentation of this claim (*Harris, supra*).

In any event, even if petitioner could now find the gas station attendant and obtain a proper declaration from him, and even if that had been before the jury at trial, it would not have made any difference in the verdict. Christopher Annis gave credible testimony at trial that he saw three persons run out of the market, one of whom he positively identified both in a photo lineup and at trial itself as being petitioner. He

also testified during cross-examination that he could not see in the back seat of the car, leaving open the possibility that there was a fourth person in the back seat. Thus, even if petitioner were now to be believed, that a gas station attendant saw petitioner, Acuna, and two others in the car just minutes before the murder, it would not be inconsistent with Annis's testimony that three persons, including petitioner, came out of the market after the shooting, carrying guns. Rather, it is still possible, under Annis's testimony, that a fourth person was in the back seat of the car. It is also still possible that at some point between the gas station and the market, a fourth person got out of the car. The gas station attendant, therefore, would have added nothing to change the outcome of the trial. The jury still would have believed Annis's testimony that three persons, including petitioner, came out of the market.

Petitioner also alleges that he told his trial counsel and the investigator that the $50 he had on him at the time of his arrest 45 minutes after the crime came from a paycheck he had received just two days previously from his work at America Live. Petitioner claims that this could have been verified by his supervisor, Norma Jean O'Connell. However, petitioner attaches no declaration by O'Connell attesting to this (*Harris, supra*). In any event, again there is no showing of prejudice. Even if this had been presented to the jury, the jurors could reasonably have believed that petitioner no longer had the $50 from his job, two days having passed since he had

allegedly been paid, and instead believed that petitioner and Acuna had taken $100 from the market and had split the proceeds, he getting $50 and Acuna getting $50. Even if the jury was not sure about the source of petitioner's $50, petitioner's claim does not explain the $50 found on Acuna, or Christopher Annis's credible testimony that he saw petitioner and two others run out of the market with guns immediately after the clerk inside had been shot. Therefore, even if petitioner had presented credible documentation of his claim regarding the $50, presentation of that evidence at trial would not have made a difference in the outcome of the trial.

Petitioner next alleges that after petitioner testified at trial, the prosecution, in rebuttal, played for the jury a videotape of petitioner in custody at the sheriff's department shortly after arrest, and that petitioner had not been told by his trial counsel before he testified that such a videotape even existed. Petitioner claims that the videotape showed petitioner intoxicated and making profane remarks and gestures, and petitioner making statements inconsistent with his trial testimony. Petitioner claims that his counsel should have gone over the videotape with petitioner before he testified. Petitioner, however, does not set forth how his testimony would have been different, had he seen the videotape before he testified, and whether his story on the witness stand would have changed, let alone whether he would have testified any differently so as to refute Christopher Annis's testimony. Nor does he claim that he would

not have decided to testify had he seen the videotape beforehand. Therefore, petitioner fails to show how the outcome of the trial would have been different, had he seen the videotape before he testified.

Petitioner next alleges that his trial counsel was ineffective in failing to subpoena Officer Smith to testify. As noted in the Third District Court of Appeal opinion affirming the judgment in this case, however, even if it were error for the trial court to have denied a continuance so that Officer Smith could have testified, it would have made no difference in the outcome of the trial. Christopher Annis testified that three persons, including petitioner, came running out of the market with guns, which is not inconsistent with petitioner's testimony that there were four of them, including the two unnamed persons, as the fourth person could have been in the back seat of the car and just not seen by Annis. Further, both petitioner and Esquivel had already testified about the consequences of a gang member "snitching" on another, and at most Smith's testimony would have been cumulative.

Petitioner next claims that trial counsel was ineffective for failing to present the jury with expert testimony concerning the fallibility of cross-ethnic eyewitness identification under rapid and exciting circumstances. Petitioner, however, presents no declaration from an expert on cross-racial identification, on what would have been presented to the jury had it been offered (*Harris, supra*). Nor is there any showing that had this been offered into evidence, it

would have been an abuse of discretion for the trial court not to have allowed it. It is error to exclude cross-racial identification expert testimony only if the eyewitness identification of the defendant is a key element of the prosecution's case, the eyewitness identification is not substantially corroborated by evidence giving it independent reliability, and the defendant offers expert testimony on specific psychological factors shown by the record that could affect the accuracy of the identification but are not likely to be fully known to or understood by the jury (*People v. McDonald* (1984) 37 Cal.3d 351, 377; *see also People v. Sanders* (1995) 11 Cal. 4th 475). In this case, the eyewitness identification by Christopher Annis was key, but there was other evidence substantially connecting petitioner to the murder: petitioner admitted he was there at the scene; petitioner was caught in the car bearing the license plate number that Annis had seen, within 45 minutes of the murder; at the time petitioner was caught, he had a gun with him that had fired shots in the market. Nor does petitioner show any specific psychological factors that could have affected the accuracy of the identification.

Petitioner next alleges that trial counsel failed to cross-examine the Annis brothers. He claims only that when cross-examining Allen Annis, the trial court abruptly stated that it wanted to finish with the witness that evening and that cocounsel was to be given the opportunity to cross-examine, and that trial counsel acquiesced. Petitioner makes no showing of what trial counsel failed to ask during the

cross-examination that he did conduct, and what further cross-examination would have borne fruit . . . [or] would have changed the outcome of the trial.

Petitioner next alleges that trial counsel failed to adduce evidence of petitioner's intoxication level at the time of the crime. Petitioner claims that "among other things, such evidence would have enabled [petitioner] to provide a relatively ameliorative explanation concerning his inappropriate conduct on the video tape." Petitioner does not claim, however, that such evidence would have affected the jury's determination of whether he was intoxicated at the time he committed the crimes, and if so, whether the intoxication was to such an extent that petitioner did not actually form the intent to commit the crimes. Nor does petitioner make any showing, with documentary evidence or affidavits, as to what his intoxication level actually was at the time of the crime (*Harris, supra*).

Petitioner's final allegation of ineffective assistance of counsel is that trial counsel failed to provide petitioner with effective assistance in postverdict proceedings, because trial counsel did not visit petitioner after the verdicts, and to date, despite repeated requests from petitioner's current counsel, has not turned over his trial file. Petitioner, however, points to nothing specific in the postverdict proceedings that evidences a deficiency in performance at the postverdict stage (*Swain, supra*; *Harris, supra*).

Not having stated a prima facie case under *Strickland, supra,* petitioner's claim of ineffective assistance of counsel fails, regardless of whether any part of this claim is barred under *Waltreus, supra,* or *Clark, supra.*

Petitioner's fourth and final claim is that the trial court misinstructed the jury so as to impermissibly lessen the prosecution's burden of proof, in three respects: that the trial court failed to give a third party culpability instruction, that the trial court failed to give a voluntary intoxication instruction, and that the trial court failed to instruct the jury on reasonable consequences and the natural and probable consequences dotrine [sic].

Petitioner raised the issues of the failure to give the third party culpability instruction and the failure to give the voluntary intoxication instruction on appeal, and these were rejected. Therefore, this part of the claim is barred under *Waltreus, supra.*

As for the failure to instruct on reasonable consequences and the natural and probable consequences doctrine, this claim should have been but was not raised on appeal, and therefore is barred under *Dixon, supra.*

Petitioner does not show that any of these issues qualifies for an exception to either the *Waltreus* or *Dixon* bar.

Further, the claim is barred under *Clark, supra,* for untimeliness. No part of the claim qualifies for an exception to the *Clark* bar.

DATED: 6-9-99 /s/ John V. Stroud
JUDGE

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

In re IVAN GALVAN on Habeas Corpus.

C033578
Sacramento County
No.

BY THE COURT:

The petition for writ of habeas corpus is denied.

Dated: September 23, 1999

SCOTLAND, P.J.

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cc: See Mailing List

S082506

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

IN RE IVAN GALVAN

ON

HABEAS CORPUS

(Filed Mar. 29, 2000)

Petition for writ of habeas corpus is DENIED. (*In re Waltreus* (1965) 62 Cal.2d 218, 225; *In re Dixon* (1953) 41 Cal.2d 756, 759; *In re Swain* (1949) 34 Cal.2d 300, 304; *People v. Duvall* (1995) 9 Cal.4th 464, 474.)

/s/ George
Chief Justice

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SACRAMENTO

DATE & TIME: MARCH 14, 2002 DEPT. NO.: 42
JUDGE: KENNETH L. HAKE CLERK:
REPORTER: NONE C. CLAUSEN
BAILIFF: NONE

IN RE: IVAN GALVAN

CASE NO. 02F01801

NATURE OF PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS – ***ORDER***

The petition for writ of habeas corpus has been filed and considered.

IT IS ORDERED that the petition for writ of habeas corpus is DENIED.

Preliminarily, the court notes that Exhibit C, that is attached to the petition, has been filed under seal. The court has examined its contents, and determined that (1) the declaration is pertinent to this petition and necessary to the discussion below, and (2) there is no reason for it to remain under seal. As such, IT IS FURTHER ORDERED that Exhibit C is UNSEALED.

With regard to the petition itself, petitioner has filed a second habeas corpus petition to attack the judgment in Sacramento County Superior Court Case No. 95F01592.

The petition is successive and untimely. A successive and/or untimely state habeas corpus petition is an abuse of the writ of habeas corpus, and if unjustified, is barred from habeas corpus review unless (1) it alleges facts which, if proven, would establish that a fundamental miscarriage of justice occurred as a result of the proceedings leading to conviction, or (2) the petitioner is presenting newly discovered claims after demonstrating due diligence (*In re Clark* (1993) 5 Cal.4th 750, 774-775). Only the following represent a "fundamental miscarriage of justice" in this regard: (1) an error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner, (2) the petitioner is actually innocent of the crime or crimes of which the petitioner is convicted, (3) the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed the sentence of death, or (4) the petitioner was convicted or sentenced under an invalid statute (*In re Clark, supra,* 5 Cal.4th 750, 787-798).

Petitioner claims that the *Clark* bar does not apply, because he is presenting newly discovered evidence of a pattern and practice of ineffectiveness on the part of the petitioner's trial attorney, W. Bradley Holmes.

Petitioner's sole claim in this petition is that on November 30, 2001, petitioner's trial attorney Holmes

was found to have rendered ineffective assistance of counsel at the recent trial of a different defendant in another case, *People v. Lisa Castelone*, Case No. CR 76351, and that this single instance of a finding of ineffectiveness of Mr. Holmes, years after petitioner's own trial, establishes a pattern and practice of ineffectiveness, which thereby establishes that Mr. Holmes had been ineffective in petitioner's case. He claims that he therefore should be allowed to proceed with a second petition, to again assert a claim of ineffective assistance of counsel. As the trial in *Castelone* had just taken place in 2001 and Judge McMaster granted a motion for new trial in the case in 2001, which occurred after petitioner's first habeas petition was filed and denied, petitioner claims this meets the newly discovered evidence exception to *Clark*, to allow for the consideration of the claim on its merits.

Even as newly discovered evidence, however, petitioner fails to state a prima facie case for relief (*In re Bower* (1985) 38 Cal.3d 865).

First, petitioner does not assert any specific conduct by his trial attorney Holmes that constituted ineffective assistance of counsel, as he did, and rather exhaustively, in his first habeas petition in Case No. 99F03892. Even if he had reiterated those assertions, however, they would not show ineffective assistance of counsel warranting habeas corpus relief. In the first habeas petition, Case No. 99F03892, the court examined each separate assertion of ineffective assistance of counsel, and rejected each, as petitioner had showed nothing that refuted in any way the

eyewitness testimony at trial that he came running out of the market with a gun immediately after the shots were fired inside. As a result, the court, on the first habeas petition, determined that prejudice had not been shown, as is required for ineffective assistance of counsel claims under *Strickland v. Washington* (1984) 466 U.S. 668, as it was not reasonably probable that had any of the alleged ineffective acts not occurred the outcome of the trial would have been any different. As petitioner does not now, in his second petition, allege any other conduct by trial attorney Holmes that would constitute ineffective assistance of counsel, even if he were relying on his assertions in the first petition he still fails to show prejudice.

Petitioner claims, however, that because he is establishing a pattern and practice of ineffectiveness by attorney Holmes in the current petition, he does not need to show prejudice. He cites three cases in support of his proposition. None of these cases, however, stands for such a proposition.

In *Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, the defendant there claimed conflict of interest with trial counsel, and ineffective assistance of counsel. In discussing the ineffective assistance claim, the defendant alleged that his brother had confessed on several occasions that the brother, and not defendant, was the murderer, yet the defendant's trial attorney did not have the brother interviewed nor did he seek to have any of the brother's out-of-court confessions introduced as statements against penal interest, nor

did he have the brother testify at trial even though the brother appeared at trial, possibly to testify. The Ninth Circuit found that the trial attorney had failed to conduct even a minimal investigation that would have enabled the attorney to come to an informed decision about what defense to offer and whether to call the brother as a witness. Nor did the trial attorney attempt to obtain a written statement from the brother confirming the brother's admission of guilt, even though this defendant's habeas attorney later obtained one and attached it to the defendant's state habeas petition. Such a statement could have been introduced as a declaration against penal interest, even if the brother invoked the Fifth Amendment at the trial. This was deficient performance. And, at trial, this defendant had relied on a mistaken identification defense, as three of the five eyewitnesses at one time had identified the brother as the shooter, and both the brother and the defendant had a motive to do the shooting. The Ninth Circuit concluded that mistaken identity would have been a plausible and quite possibly a successful defense if the brother's statements, which the Ninth Circuit determined would have been admissible as statements against penal interest, had been introduced by the defense at trial.

The *Sanders* court then noted a related and compelling explanation for the defense attorney's failure to investigate the case and obtain statements and perhaps testimony from the brother: the attorney's subsequent disbarment in 1990 for a similar

course of conduct demonstrating a complete indifference to the attorney's legal and ethical duties to the great detriment of his client. The *Sanders* court noted that the California State Bar Court had found a course of conduct based on specific instances of complete indifference and great detriment to clients in at least eight different cases, stretching from 1979 through at least 1987. In most of these instances, the attorney had been retained by clients and then did nothing to investigate or further their cases. The *Sanders* court viewed this pattern of misconduct as refuting the argument that the attorney's failure to use the brother's confessions was based on a strategic decision. The *Sanders* court, however, did *not* see the pattern of conduct as *excusing* the defendant from showing, on federal habeas corpus, that the defendant was *prejudiced* by the ineffective performance:

> "[The defense counsel's] incompetent performance at [defendant's] trial is not enough, standing alone, to establish a Sixth Amendment violation. In addition, [defendant] must show that he was prejudiced by [the counsel's] incompetent performance. *Strickland*, 466 U.S. at 694 [ ]. He must show that 'there is a reasonable probability that, absent [the counsel's] errors, the factfinder would have had a reasonable doubt respecting [defendant's] guilt.'"

The Ninth Circuit in *Sanders* then found that the trial counsel's inadequate performance clearly prejudiced the defendant, as required by *Strickland*.

> "The answer to the prejudice inquiry in this case is evident. [Defense counsel's] clearly incompetent representation must certainly undermine one's confidence in the murder conviction. [Defense counsel's] incompetence served to deprive [defendant] of the most critical evidence supporting his best defense. Given the fact that three of the state's five eyewitnesses at some point identified [the brother] as the shooter, it cannot possibly be said with 'fair assurance' that had the jury heard [the brother's] confession it would still have convicted [defendant]."

Having found prejudice from the deficient performance, the Ninth Circuit in *Sanders* then granted federal habeas corpus relief from the conviction.

Contrary to petitioner's assertion in the current petition for writ of habeas corpus, *Sanders* did *not* stand for the proposition that once a pattern and practice of ineffective assistance is shown, prejudice to the petitioner is not required to be shown. Rather, *Sanders* clearly *reiterated the Strickland standard*, that to obtain habeas corpus relief from ineffective assistance of counsel a petitioner must show *both* ineffectiveness *and* that but for the ineffectiveness, there is a reasonable probability that the outcome of the trial would have been different. And, *Sanders specifically found that prejudice*, under *Strickland*, and after doing so granted federal habeas relief.

Petitioner, in the current petition, next cites *Spann v. Martin* (4th Cir. 1992) 963 F.2d 663 for his

proposition that once a pattern and practice of ineffective assistance is shown, prejudice to the petitioner is not required to be shown. Again, petitioner is mistaken, as *Spann* did *not* establish such a rule of law.

In *Spann*, the issue was whether the federal district court abused its discretion in dismissing a habeas petition without prejudice so that the defendant there could reexhaust certain court claims. The Fourth Circuit held that the district court did abuse its discretion, and reversed and remanded for a prompt consideration of the case on the merits.

The defendant in *Spann* had attempted to bring, among numerous other claims, an ineffective assistance of counsel claim in his habeas petition that had been dismissed. After filing the petition, the defendant filed a motion for leave to reexhaust this ineffective assistance claim in the South Carolina courts, in light of a South Carolina decision in *Frett v. State* (1988) 378 S.E.2d 249. *Frett* had been decided 29 months before the defendant's motion for leave to exhaust was filed, so the district court had dismissed the petition.

On appeal of that dismissal in *Spann*, the defendant argued that *Frett* had represented a significant change in the law, by relaxing or obviating the prejudice prong of *Strickland*. The [Fourth] Circuit stated:

> "A quick review of *Frett* and the opinions of the South Carolina Supreme Court subsequent to *Frett* would have shown the district

court that if *Frett* changed the prejudice prong of *Strickland,* which is doubtful, such change applied only to *Frett. Frett* was an unusual case because the attorney who had represented Frett was quite familiar to the South Carolina Supreme Court and had been publicly reprimanded for neglecting legal matters entrusted to him and handling legal matters without adequate preparation in *Matter of Gaines,* [ ] 309 S.E.2d 5 (1983), and had been indefinitely suspended because his actions reflect 'a pattern of unprofessional conduct and demonstrate his present unfitness to practice law.' [*Gaines.*] In *Frett* the court found: 'While a defendant must ordinarily show that counsel's ineffective assistance resulted in actual prejudice, such a showing may be exempted where counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary.' [citation omitted.] When the South Carolina court decided *Frett* in 1988, it had just previously (1987) decided that his trial attorney, Gaines, was unfit to practice law, and after reviewing the record in *Frett,* it found 'ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary.'

"A review of the decisions in the South Carolina Supreme Court reflects that *Frett* has not been cited by the court, since it was originally decided, and the court has in [subsequent cases] continued to apply the second prong of *Strickland* as originally set forth by the United States Supreme Court, and

> without any reference to *Frett*. We conclude that any dismissal to allow a reexhaustion of the ineffective assistance of counsel claim based upon *Frett* is an abuse of discretion, because the claim is obviously frivolous, and a dismissal at this stage of a federal habeas proceeding would only add to the embarrassing length of time that has elapsed since the case was filed in the federal courts.
>
> ". . . . We have concluded that there is no merit to the *Frett* claim, and we now remand this action to the district court for a prompt consideration of the magistrate judge's reports and recommendations and the objections thereto."

Clearly, in its discussion of *Frett,* the Fourth Circuit *did not adopt Frett* as a matter of federal constitutional law, and *did not hold that the prejudice prong of Strickland need not be shown in a Frett-type situation*. Rather, the Fourth Circuit found that the defendant's *Frett* claim was frivolous and dismissal to allow exhaustion of the claim was not needed.

Nor could *Frett* be seen to be controlling in California. It was a decision only of . . . another state's highest court, and not of the United States Supreme Court or any other federal court. As it is not controlling in California, and *Strickland,* a United States Supreme Court decision, is controlling in California, the petitioner in the case at bar is required to show prejudice and is not excused from that requirement, even if he is able to show a pattern and practice of ineffective assistance of counsel by his trial attorney.

Petitioner nevertheless attempts to argue that such a rule does exist in California courts, by citing a third case, *In re Vargas* (2000) 83 Cal.App.4th 1125. In *Vargas,* the defendant there had entered a nolo contenders [sic] plea to the charges. He then filed a habeas petition with the court of appeal, in conjunction with his appeal in the case, alleging that his trial attorney had rendered him ineffective assistance of counsel and had coerced him into accepting the plea. The court of appeal determined that he was entitled to an evidentiary hearing on this habeas claim, and directed the superior court to conduct an evidentiary hearing and to grant or deny relief.

In so holding, the court of appeal in *Vargas* noted:

> "A claim of ineffective assistance of counsel has two components: '"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." [Citation.] [¶] To establish ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." [Citation.] To establish prejudice he "must show that there is a reasonable probability that, but for counsel's

> unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [Citations omitted.]'
>
> ". . . . '[When the contention is that incompetent advice led to a defendant's pleading guilty], a defendant must establish not only incompetent performance by counsel, but also a reasonable probability that, but for counsel's incompetence, the defendant would not have pleaded guilty and would have insisted on proceeding to trial.' [citations omitted.]"

Clearly, *Vargas* did not adopt any standard other than that of *Strickland* for ineffective assistance of counsel claims.

As for a pattern and practice of ineffectiveness, the *Vargas* court stated:

> "The simple fact that a particular trial attorney has been accused of or has a reputation for rendering inadequate services, or has been found incompetent may have little relevancy in proving the attorney rendered ineffective assistance of counsel in another case. (*Maciel v. Carter* (N.D.Ill. 1998) 22 F.Supp.2d 843, 858.) Ordinarily, accusations of incompetency cannot be used to subject counsel to open-ended inquiries about counsel's entire career. (*Bonin v. Calderon* (9th Cir. 1995) 59 F.3d 815, 828-829.) To find that an attorney has rendered services below the standard of

care, each case must be examined according to its own facts. [*Strickland.*] Any evidence of prior neglect must have a bearing on the new accusations. (*Maciel v. Carter, supra,* at p. 858.)

"Here the repeated and severe accusations of misfeasance on the part of [this attorney] have been recognized by many courts as having substance worthy of investigation. This is not the usual case. At petitioner's request, we have taken judicial notice of the following cases in which [this attorney] represented criminal defendants. These and other cases may establish a pattern by [this attorney] of rendering ineffective assistance of counsel. [*Sanders v. Ratelle.*]

"In May 2000, in a case involving Jose Casillas Camarena, Division One of this District affirmed a judgment of conviction. However, on direction of the Supreme Court, it also issued an order to show cause returnable in the superior court based upon a claim that [this same attorney] rendered ineffective assistance of counsel. Camarena was convicted on two counts of continuous sexual abuse arising from charges that he sexually abused two young girls (Pen. Code, § 288.5). Although there was exculpatory medical evidence and evidence to impeach the credibility of the witnesses, [this same attorney] did not present the evidence. [The attorney] also failed to adequately cross-examine witnesses, present a sentencing memorandum, or present mitigating factors

at the sentencing hearing, Division One called [the attorney's] closing argument 'gibberish.' Division One believed that [the attorney] 'failed utterly to provide defendant with any defense.' The case was returned to the superior court for an evidentiary hearing and factual determinations on the issues presented.

"This Division decided a case involving Jose M. Canela on October 26, 1999. Canela was convicted of two counts of special circumstance murder, two counts of first degree robbery, and first degree burglary. (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17), 211, 459.) We stated that [this same attorney's] representation was 'clearly deficient,' falling 'far below an objective standard of reasonableness under prevailing professional norms. [She] made no opening statement or closing argument. [She] asked a total of 22 ineffectual questions of the People's four witnesses and she presented no defense whatsoever. [This same attorney] made no statement at sentencing and . . . "stood mute." . . . In fact, [this attorney's] performance was so lacking and the resulting record on appeal is so minimal that it is difficult to tell exactly what steps a reasonable defense counsel could or should have taken in furtherance of Canela's defense.' Because the evidence was overwhelming, the defendant had no articulable defense, the defendant had confessed to two first degree, special circumstance murders, and the trial court was required to sentence the defendant to life

terms for his convictions, we could not conclude the 'appalling' representation prejudiced Canela. We denied the accompanying writ petition without prejudice to filing an original proceeding in the superior court.

"Jeffrey Lee Caito was convicted of petty theft (Pen. Code, § 666). In his petition for writ of habeas corpus, Caito claimed that he had pled guilty and admitted the priors only because [this same attorney] promised he would be sentenced to six years. The defendant also alleged that [this attorney] failed to do legal research and failed to adequately advise about the consequences of the plea. The defendant was sentenced to 25 years to life. Division Seven of this district concluded a prima facie case of ineffectiveness in the representation was shown and ordered the superior court to hold an evidentiary hearing.

"Steven Bullard, a state prisoner, sought relief from default and permission to file an appeal. According to Bullard, [this same attorney] did not file a notice of appeal even though she had promised to do so. In her declaration, [the attorney] declared that Bullard had pled guilty and she denied telling Bullard she would file a notice of appeal on his behalf. Subsequently, [the attorney] declared that she was "mistaken," and acknowledged that she had represented Bullard in a court trial. Division Five of this district resolved the factual conflicts in Bullard's favor, granted the petition for writ of habeas

corpus, and permitted Bullard to file a notice of appeal.

> "Petitioner contends these cases will prove that Attorney Vargas was ineffective in representing petitioner. In the evidentiary hearing before the superior court, that court will be in a better position to determine whether these and other cases are relevant to establish a pattern by [the attorney] of rendering inept legal services and whether such pattern is relevant to prove the issues presented by petitioner. (Evid. Code, §§ 351, 1105.) Facts from other cases may be relevant with regard to [the attorney's] credibility. [*Bonin v. Calderon.*] A full evidentiary hearing may reveal that [the attorney] lacks the ability to render competent representation, takes money from defendants, does nothing, fails to adequately apprise clients of the risks and probable outcome of plea bargains, coerces defendants into accepting quick resolutions through plea agreements, and thereafter lies about the representation provided. It may be shown that if a settlement is not reached, [the attorney] goes to trial even though she has done no investigation and even though she is incompetent to handle the trial. [fn. omitted.]"

Clearly, *Vargas* stands only for the proposition that an attorney's pattern and practice of ineffective assistance of counsel in other cases may affect the attorney's *credibility* in a case alleging ineffective assistance of counsel. It does not even stand for the

proposition that by showing a pattern and practice of ineffectiveness in other cases, ineffectiveness is shown in another case. Rather, in *Vargas,* after discussing the various other cases in which the same attorney had engaged in ineffective assistance, the court of appeal still directed the superior court to conduct an evidentiary hearing, for the following purposes:

> "An evidentiary hearing is required to ascertain whether an investigation was warranted, whether [the attorney] conducted an investigation, and whether any investigation was sufficient or perfunctory . . . [,] to determine if [the attorney] was prepared for trial . . . [and] to ascertain if petitioner was fully informed before he accepted the plea agreement."

That would not have been necessary, had *Vargas* stood for anything other than that a pattern and practice of ineffectiveness might affect the attorney's *credibility.*

Vargas then went on to discuss the *prejudice* requirement. The *Vargas* court, despite its lengthy discussion of the attorney's ineffectiveness in several other cases, nevertheless *reiterated* that to prevail on his ineffective assistance of counsel claim in the proceeding, he needed to show that had he received effective representation, he would not have accepted the plea offer. The *Vargas* court then noted that the record corroborated the defendant's statements that he thought the plea offer was for 12 years and not

24 years, and that had he known he would serve 24 years at 85 percent time he would not have accepted the plea agreement. The *Vargas* court found credible defendant's assertion that he believed he had no alternative but to enter the plea, because his attorney was not prepared to proceed. Further, the *Vargas* court noted that the defendant insisted he was innocent and the charges were fabricated, and that he wanted to go to trial. Therefore, the *Vargas* court concluded:

> "The evidence before us suggests that had petitioner been fully informed, and had [the attorney] rendered effective assistance of counsel, petitioner would not have accepted the plea agreement.
>
> "An evidentiary hearing is required to determine the truth or falsity of petitioner's and [the attorney's] factual allegations."

The *Vargas* court further concluded that there was a sufficient showing that defendant there was also pressured into accepting the plea bargain by an unprepared attorney, and that the attorney's declaration *lacked any indicia of reliability*, again another subtle reference to the earlier discussion in the opinion that a pattern and practice of ineffectiveness goes only to the attorney's *credibility*. Thus, an evidentiary hearing was needed on the coercion claim, as well.

As clearly seen, *Vargas* also did *not* establish any rule in California that when a pattern and practice of ineffectiveness is shown, that a habeas petitioner

asserting ineffective assistance of counsel does not need to show the prejudice prong of *Strickland,* that but for the ineffectiveness there is a reasonable probability that the outcome of the trial would have been different.

Petitioner's contention, then, that he is excused from establishing prejudice to prevail on his renewed ineffective assistance of counsel claim, merely because the attorney had a pattern and practice of rendering ineffective assistance of counsel, fails on the merits. As such, he fails to state a prima facie case for relief, as he fails to show prejudice (*Bower, supra*).

Even if there were such a rule of law regarding the dispensation of a showing of prejudice when a pattern and practice of ineffectiveness is established, which there is not, petitioner in this case still fails to set forth a prima facie case of relief, because he fails to show that the attorney W. Bradley Holmes, in fact, has engaged in a pattern and practice of rendering ineffective assistance of counsel to various clients.

Rather, all petitioner realistically shows is *one single other instance* of ineffective assistance of counsel, *occurring years after petitioner's own trial.* Specifically, petitioner attaches in support of his second habeas petition a transcript of the new trial motion hearing in *People v. Lisa Castelone,* Case No. CR 76351, held on November 30, 2001, years after petitioner's own conviction, showing that Judge McMaster found Mr. Holmes to have rendered

ineffective assistance of counsel to defendant Castelone in a recent trial. Petitioner also attaches a declaration under seal, from Fern Laethem, the director of this county's Indigent Defense Program, that after Judge McMaster granted the new trial in *Castelone*, Mr. Holmes was investigated and removed from the Indigent Defense Program's list of appointments for *homicide* cases, and notably *not* for *all* cases.

Webster's New World Dictionary, Second College Edition (1968) provides for a definition of "pattern" in the context of a behavior pattern, as "a regular, mainly unvarying way of acting or doing." Webster's Third New International Dictionary (1986) provides for a definition of "practice" as being "to do or perform often, customarily, or habitually" or to "engage regularly in."

A single instance of ineffective assistance of counsel, in another case tried years after this petitioner's case was tried, simply does not, by itself, establish either a "pattern" or a "practice" of rendering ineffective assistance of counsel to clients at the time of petitioner's own trial. Thus, even if the prejudice prong were not required to be shown, petitioner's claim fails, because he simply does not set forth a [text apparently omitted from original].

For all of these reasons, the petition is denied.

DATED:

_____

JUDGE

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

In re IVAN GALVAN on Habeas Corpus.

C040722
Del Norte County
No.

BY THE COURT:

The petition for writ of habeas corpus is denied.

Dated: April 11, 2002

BLEASE, Acting P.J.

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cc: See Mailing List

Court of Appeal, Third Appellate District – No. C040722
S106062

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re IVAN GALVAN on Habeas Corpus

(Filed Jul. 10, 2002)

Petition for review DENIED.

Brown, J., was absent and did not participate.

/s/ GEORGE
Chief Justice

DECLARATION OF LEE SMITH

I, Lee Smith, hereby declare as follows:

1. I was called by the defense to testify in the case of *People v. Ivan Galvan,* Sacramento County case number 95F01591

2. Though I was not subpoenaed, I had agreed, in discussions with Brad Holmes, Esq., to appear and testify voluntarily.

3. On the date that I was scheduled to testify, I was very ill, and I was unable to make it to court.

4. I did come to court the following day, and I was willing to testify at that time.

5. I am a semi-retired law enforcement officer, I currently work part-time as a court security officer in the new federal courthouse in Sacramento.

6. For 12 years, I worked as an officer in the Sacramento County Sheriff Department's gang suppression unit.

7. At the time I was called to testify in the *Galvan* case, I was recognized by the Department of Justice as an expert on the subject of Hispanic and Black gangs in northern California.

8. I have testified on many occasions concerning Norteno gang members. I am very knowledgeable concerning the customs, habits, and beliefs of Norteno gang members. I have been called as an expert witness on gang issues many times by the Sacramento

County District Attorney's office. I have been recognized to testify as an expert many times.

9. Unlike many gang members, Nortenos will not "snitch" on fellow gang members. It is a firmly established tradition that a Norteno gang member and/or associate will not go to law enforcement with information which could be used to implicate a fellow gang member. Indeed, Norteno gang members take an oath in blood, when they are initiated as gang members. Under their oath, they are forbidden to "snitch" on fellow gang members. Even Nortenos who are not active gang members adhere to this oath.

10. If a Norteno were ever to "snitch" on a fellow gang member, he would be in grave danger, and his family would be in grave danger. Indeed, a Norteno who gives information to law enforcement about a fellow gang member could quite possibly be killed by other Nortenos. Similarly members of the family of such a person could quite possibly be killed. The Norteno gang obviously has many members in the California prison system. A Norteno who became a "snitch" in prison would be in danger of being killed in the prison.

11. I have known may [sic] young Hispanic males affiliated with the Norteno gang to take responsibility for a crime that an older Norteno member committed. The younger man will then go to prison and serve time for the crime he did not commit. This earns the young Norteno a great deal of respect in the Norteno community.

12. It does not surprise me at all to learn that Ivan Galvan, after serving over four years in custody for a homicide he says he did not commit, has refused to identify the two individuals who he says actually perpetrated the crime. It is my understanding that Mr. Galvan is affiliated with the Norteno gang, as are the two individuals who he says did commit the homicide.

13. If Mr. Galvan were to identify these two individuals, he and his family would be in serious danger.

14. Mr. Galvan's street name was "weasel." I knew of the name and knew of his association with the Norteno gang. Because of Mr. Galvan's ties to the Norteno gang, he simply will not "snitch" on any of his "home-boys", i.e., fellow members and/or associates of the Norteno gang.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: May 12, 1999, 1999 /s/ Lee Smith
LEE SMITH